

SELFISH INTENTIONS: KANSAS WOMEN AND DIVORCE IN NINETEENTH CENTURY
AMERICA

by

JANEAL SCHMIDT

B.S., Kansas State University, 2007

A THESIS

submitted in partial fulfillment of the requirements for the degree

MASTER OF ARTS

Department of History
College of Arts and Sciences

KANSAS STATE UNIVERSITY
Manhattan, Kansas

2009

Approved by:

Major Professor
Dr. Sue Zschoche

Copyright

JANEAL SCHMIDT

2009

Abstract

In the United States, legal authorities well into the 20th century wanted to maintain the integrity of the marriage union; therefore, early divorce laws made it difficult to get divorced. When two individuals, a man and a woman, signed a marriage contract, their identities as two individuals became secondary to their identities as husband and wife. The “unit” established by the marriage was now a matter of public interest and of greater social importance than either individual. Legally, legislatures writing the laws and the courts enforcing them therefore did their best to maintain this unit. When one member of the unit petitioned for divorce, in effect they were claiming the actions of the other member of the unit had violated the legal and sacred bonds of that unit.

In the late 19th century, western states, including Kansas began to make more liberal provisions for divorce. This study will examine those liberal divorce laws in Kansas with a particular focus on women who, like the Populist orator Mary Elizabeth Lease, used the law to protect their individual property interests in a marriage. Though such women were by no means the majority of women who sought divorce, their cases highlight a growing controversy in late nineteenth century Kansas over the state’s provisions for divorce. The openness of the state’s divorce laws allowed individuals, including female individuals, to use the law for their own purposes. Faced with the staggering increase in the Kansas divorce rate by the end of the century, some judges complained that the law did not adequately protect the state’s interest in preserving marital unions.

To date, the historiography on divorce has focused on nation-wide trends. By focusing on Kansas law and the experience of women in the north central part of the state, this study seeks

to open up an analysis, not just of the law, but of how individuals used the law. Chapter One includes a discussion on the evolution of divorce law in the United States. Chapter Two focuses on Kansas law and examines the uses that two particular women made of that law to act on their own behalf. Chapter Three examines the growing controversy in the late nineteenth century Kansas regarding the rising divorce rate and uses a controversial Clay County case to highlight some of the judicial concerns about the “abuses” of the law.

Table of Contents

Acknowledgements.....	vi
Dedication	vii
Introduction	viii
CHAPTER 1 - Divorce Law in the United States	1
CHAPTER 2 - Changes in Kansas Divorce Law	20
CHAPTER 3 - Concerns about Liberal Divorce Law	39
Conclusion.....	71
Bibliography	75

Acknowledgements

I would like to acknowledge the following people for their support and encouragement throughout my life and especially during graduate school:

I have been truly honored to work with my committee including my major professor Dr. Sue Zschoche, who taught me to love women's history and to look outside the box; Dr. Lou Williams, who taught me to love Southern history and how Constitutional history is interwoven throughout the story of American history; and Dr. Charles Sanders, who taught me how to teach history. I would also like to acknowledge the support of Dr. MJ Morgan and the Kansas State University Chapman Center for Rural Studies during this project.

I cannot thank Cathy Haney and the Clay County Historical Society enough for their help during my research, as well as the staff of the Clay County Courthouse and Kansas State Historical Society. Furthermore, I appreciate the help of Sandra Reddish during this project.

I would like to thank the James Madison Memorial Fellowship for their support for my graduate studies.

Finally, I would like to thank the Kansas State University Department of History faculty and staff for their assistance throughout my career at K-State.

Dedication

To my Lord and Savior Jesus Christ, without Him I would not have been able to do any of this.

To My Parents, without your love, support, and encouragement I would not be where I am today.

Thank you for always believing in me!

To my Aunt Rita, I am inspired by your love of history.

To Jon, Nathan, Jared, Jessica, and Kirstin, thank you for listening and making me laugh!

To my extended family and friends, thank you for your prayers, support, and encouragement.

To my graduate school friends, thank you for keeping me sane and providing advice!

Introduction

In the early 1880s, a young wife and her husband moved from Denison, Texas, to Kingman County, Kansas, after their farm failed in Texas. Mary Elizabeth Lease and her husband, Charles, homesteaded around the town of Kingman. Besides farming Charles Lease was a druggist and worked for local pharmacies in both Texas and Kansas. The Leases lived in Kingman until 1885 when they moved to Wichita. During the 1880s, Mary Elizabeth Lease became involved with several reform movements including the Women's Christian Temperance Union, the Knights of Labor and the Farmer's Alliance. When the Farmer's Alliance formed the Populist Party, Mary Elizabeth Lease traveled to give lectures in support of the Party and eventually moved to New York City with her children, leaving Charles Lease behind in Osage Mission, a small community near Wichita. And then, in 1902, when Mary Elizabeth Lease was in her early fifties, she returned to Kansas to file for divorce. In her divorce petition, she cited her husband's "non-support" as her grounds to sever their union after thirty years of marriage.¹

Lease's actions were not that unusual. By the year of her divorce, approximately one in eight Kansas marriages was ending in divorce; over two-thirds of those divorces were initiated by women. Mary Elizabeth Lease's case was, however, unusual in several respects. Unlike most women, she did not rely on her husband for support: her speaking career had provided her the means to support herself and educate her four children. In addition, sixty-five percent of the women who filed for divorce cited abandonment or extreme cruelty as the cause. Lease's divorce petition was not therefore, as was so often the case, the product of physical terror or financial desperation. Though no one can be certain why she sought divorce, it is likely that

¹ Kathryn Price, "Mary Elizabeth Lease: Lawyer, Politician and Hellraiser," Women's Legal History Biography Project, Stanford Law School, Fall 1997, womenslegalhistory.stanford.edu, 2-3, 33-34.

after five years away from Kansas, she had simply lost interest in the marriage, since no one who knew him believed that Charles Lease was the “deadbeat” husband that her petition claimed he was. He was just a man who made less money than his wife. The Kansas constitutional provisions that granted married women the right to their own property were probably on her mind: a divorce would allow Mary Lease to keep what was hers for her use alone. In any case, Charles Lease did not file a counter petition (although he could have accused her of “abandonment”). In fact the Wichita Daily Eagle reported her husband’s response:

“Mrs. Lease is all right,” said Mr. Lease to a reporter for the *Eagle* yesterday, with sorrow depicted in every line of his face. “She is wonderfully ambitious, and I presume she thinks she can make her own way in the world better without me. I never made any resistance to her getting a divorce, when I once made up my mind that she desired to have one. ...I have not one word to say against Mrs. Lease. She had to say something to get her divorce and my mind was made up to allow her to say whatever she thought best.”²

It appears that Charles and Mary Elizabeth Lease had mutually decided (although reluctantly on his part) to end the legal “contract” that had established their marriage. Why then did she accuse him of being a “ne’er do well husband” who “squandered” her earnings?³ The answer is that the state of Kansas did not view the Lease marriage as a contract, but rather as a social unit in which the state had an interest. In seeking to end her marriage, Mary Elizabeth Lease’s petition had to fit one of the ten grounds that Kansas law allowed for divorces and all those “grounds” were based on the claim that one party had violated the very nature of the role he or she had assumed upon becoming a “husband” or a “wife.”

² *Wichita Daily Eagle*, “Mr. Lease is Forgiving,” May 25, 1902, Mary Elizabeth Lease folder, Kansas State Historical Society, Topeka, Kansas.

³ Price, 32.

In the United States, legal authorities wanted to maintain the integrity of the marriage union; therefore, early divorce laws made it difficult to get divorced. When two individuals, a man and a woman, signed a marriage contract, their identities as two individuals became secondary to their identities as husband and wife. The “unit” established by the marriage was now a matter of public interest and of greater social importance than either individual. Legally, legislatures writing the laws and the courts enforcing them did their best to maintain this unit. When one member of the unit petitioned for divorce, in effect they were claiming the actions of the other member of the unit had violated the legal and sacred bonds of that unit. In *Man and Wife in America*, Hendrik Hartog explains the dominant legal thought of the period:

Divorce laws belonged to the public, not to the parties themselves. They were not intended to allow couples to escape identities assumed in marriage. Divorce punished the guilty for “criminal” conduct. Conversely, divorce allowed an “innocent” spouse to escape the moral contamination that might accompany continued cohabitation with a guilty spouse. In a world where marital unity meant something, it was important that divorce exist. At the same time, it was still more important that divorce not be understood as a form of voluntary exit available to all married couples. It was, wrote Schouler, because marriage was ‘not on the footing of ordinary contracts, that husband and wife’ could not, ‘on principle, compromise, arbitrate, or modify their relationship at pleasure.’ Or end it.⁴

Kansas law did not care whether Mary Elizabeth and Charles Lease had mutually agreed to end their marriage, nor did the law care whether either individual was “happy.” What mattered was whether one of them had so violated their status as husband or wife that the social institution of their marriage was irreparably destroyed. Someone had to be guilty.

⁴ Hendrik Hartog, *Man and Wife in America: A History*, (Cambridge: Harvard University Press, 2000), 75-76.

One other factor is important here. Mary Elizabeth Lease filed for divorce as a “wife” and wives had a different status than “husbands.” Traditionally, a married woman had no legal existence separate from her husband’s, a legal status known as “coverture.” When a man and woman were united in marriage, a wife lost control over property, her ability to make contracts, and the right to her own person. The husband would assume responsibility for his wife in all aspects including all of his wife’s premarital debts and obligations.⁵ Although Kansas had overturned part of coverture, by granting married women the right to their own property, other aspects remained. When Lease returned to Kansas to file for divorce, she did so as a legal resident of Kansas, not New York. So long as she remained married, her legal residence was that of her husband whether she lived with him or not. More importantly for her, so long as she remained married, her income belonged to the marriage, not specifically to her.

Fortunately for Lease, Kansas was a more liberal place to seek a divorce than New York, and it allowed Mary Elizabeth Lease and other Kansas women take divorce law into their own hands and use it for their own individual purposes. The Kansas divorce statutes outlined ten grounds for divorce. A person could petition for divorce in New York only if they could prove their spouse had committed adultery. Kansas also had a shorter waiting period both to establish residency and for the divorce to become final. Lastly, women petitioners were not necessarily looked at unfavorably in the state of Kansas. All of these reasons led to Kansas being known for its liberal divorce laws.

Although a number of studies have examined divorce law in the United States, the current historiography has tended to focus on national trends. Mary Somerville Jones’s *An Historical Geography of Changing Divorce Law in the United States* surveys changes in divorce

⁵ Hartog, 99.

law from a geographic perspective. Jones investigates the variation and the changes in divorce law and divorce rates. She tracks changes in numbers of state divorces compared to the changes in divorce law to determine if a specific pattern could be identified for the region. This study benefited from Jones's work because it showed how divorce law changed by region.⁶

In 1988, Roderick Phillips's *Putting Asunder: A History of Divorce in Western Society* evaluated divorce law worldwide and provided several key arguments for the changes in divorce law over time across the world. Phillips analyzes changes in the legal status and frequency of divorce in Western society. This study ranged both geographically from Australia to Scandinavia and chronologically from the Middle Ages to the late nineteenth century. However, the focus of this study was on developments in France, Great Britain, and the United States from the sixteenth to nineteenth centuries. Phillips's book explains the history of divorce worldwide for the past five centuries and the gradual liberalization of divorce legislation. This book provides necessary background information for anyone who wants to understand divorce law.⁷

Glenda Riley published the first essential book on U.S. divorce in the 1990s. In her work *Divorce: An American Tradition*, Riley surveys the changes in divorce law in the United States. In this book Riley argues, "conflict between anti-divorce and pro-divorce factions has prevented the development of effective, beneficial divorce laws, procedures, and policies."⁸ She traces the controversy of divorce in American life from the first divorce case in Puritan Massachusetts to the present. Through this analysis, she concludes the most persistent difficulties in divorce have involved child custody battles and the reality of financial survival. Finally, she notes that the effects of industrialization, urbanization, and changing gender roles are often left out of divorce

⁶ Mary Somerville Jones, *An Historical Geography of Changing Divorce Law*, (New York: Garland Publishing, Inc., 1987).

⁷ Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*. (Cambridge: University of Cambridge Press, 1988).

⁸ Glenda Riley, *Divorce: An American Tradition*, (New York: Oxford University Press, 1991), viii.

law analysis. Riley's study explains the history of divorce and subsequent changes in the law. She focused her study on the New England region.

In 2000, Hendrik Hartog published *Man and Wife in America: A History*, a work that examines the struggles of marital life, marital identities, and the legal concepts of wife, husband, and unity. He explains that even though nineteenth-century Americans respected marriage as a life-long institution, they were getting divorced at staggering rates. Hartog further argues that married couples exercised a range of options between marriage and divorce including separate maintenance agreements, abandonment, desertion, and even remarriage. Hartog's book provides a better understanding of the history of marriage in America. Hartog supplies an overview of marriage in the United States. A careful review of this book provided essential information about marriage necessary to form the underpinning of this study.⁹

One of the best recent works on the law as it pertains to women's history is Sandra F. VanBurkleo's *Belonging to the World: Women's Rights and American Constitutional Culture*. VanBurkleo synthesizes the struggle for women's rights and the relationship of this struggle to the Constitution. In her work, VanBurkleo establishes a comprehensive view of women's attempts, both private and public, to gain rights from the colonial era to the late 1990's. As she maps the history of women's rights, VanBurkleo outlines the changing roles of women in both the public and private sphere. She explains the relationship of women to their husbands, local community, and to the law. She outlines the changes in divorce law across the country and delineated how these changes affected women. VanBurkleo's masterful work supplies valuable information about women's property rights and rights to divorce. New additions to the body of

⁹ Hendrik Hartog, *Man and Wife in America: A History*, (Cambridge: Harvard University Press, 2000).

scholarship on divorce law continue to add to the knowledge of divorce in both Kansas and the United States and to substantiate the role of women as related to divorce law.¹⁰

This study will argue that some women, like Mary Elizabeth Lease, used the liberal divorce laws in Kansas to protect their individual property interests in a marriage. Though such women were by no means the majority of women who sought divorce, their cases highlight a growing controversy in the late nineteenth century Kansas over the state's provisions for divorce. The openness of the state's divorce laws allowed individuals, including female individuals, to use the law for their own purposes. Faced with the staggering increase in the Kansas divorce rate by the end of the century, some judges complained that the law did not adequately protect the state's interest in preserving marital unions.

To date, the historiography on divorce has focused on nation-wide trends. By focusing on Kansas law and the experience of women in the north central part of the state, this study seeks to open up an analysis, not just of the law, but of how individuals used the law. Through an analysis of newspaper records, divorce case law, state and national divorce statistics, and local divorce cases, this study will contend women used the liberal divorce laws in Kansas to protect their own interests and explain why district court judges were so upset about the lack of care for the marriage union. Chapter One includes a discussion on the evolution of divorce law in the United States. Chapter Two focuses on Kansas law and the uses that two particular women made of that law to act on their own behalf. Chapter Three examines the growing controversy in late nineteenth century Kansas regarding the rising divorce rate and uses a controversial Clay County case to highlight some of the judicial concerns about the "abuses" of the law.

¹⁰ Sandra F. VanBurkleo, *Belonging to the World: Woman's Rights and American Constitutional Culture*, (New York: Oxford University Press, 2001).

CHAPTER 1 - Divorce Law in the United States

Divorce in the English colonies was not impossible, but it was certainly rare. It can be argued that it was not until the late nineteenth century that divorce laws in the western U.S. abandoned these conservative origins for more liberal legal codes. Divorce law in the United States derived from the tradition of English common law. English common law was a legal system established by judicial precedent rather than through legislative action. The body of precedents set by previous legal cases provided the basis for legal decisions. Following the American Revolution, each state had the option to codify their laws and many states amended these laws as time passed. Divorce law, however, remained overwhelmingly conservative until the western territories that became states formalized their own laws for marriage and divorce, most of which were more liberal than the laws of East coast states. Women living in the western states benefited from the liberal nature of these laws. They used divorce as a remedy to escape from irreparable marriages. The liberalization of U.S. divorce law positively affected women all across the country.

The English legal tradition from which the U.S. derived its legal system was quite complicated when addressing divorce. In early Christian societies, marriage occurred when a man and a woman willed themselves wed. But as the Roman Catholic faith was institutionalized across western Europe, the church controlled all aspects of the marriage, treating the union as a sacrament. Great Britain was no exception. Prior to the Reformation in Great Britain, the law emphasized the indissolubility of marriage. After the Reformation the ecclesiastical, or religious, courts claimed the power to dissolve a marriage but only on the grounds of adultery. Following the Restoration, the civil courts became involved, and it took several steps for a

person to get divorced. First, the party had to get a decree of separation from the ecclesiastical court. Then the innocent party instituted charges in civil court to receive damages from the person who had wronged him or her. Lastly, the party petitioned Parliament to obtain an Act of Parliament that finally would sever the marriage. This process was expensive and time consuming; therefore, divorce was uncommon and restricted to the wealthy.¹¹

English practice was therefore different than most Protestant countries such as Switzerland, Germany, Scotland, and Scandinavia that viewed marriage as a non-sacramental agreement or contract. Marriage in these countries could be blessed by the church if the couple wished, but legally they were married when the contract was completed. In Protestant England, however, the church courts retained control over marriage laws, although the Puritans departed from the English practice by arguing to abolish the church courts and implementing marriage by contract, thus following the changes occurring in Protestant countries. As the historian Sandra VanBurkleo elaborates, “By insisting on sacramental marriage and administering canon law in civil courts, Anglicans rowed against the Protestant current. But even radical Puritans thought that marriage, unlike simple civil agreements, had social and cultural implications and so could be regulated by secular authorities.”¹²

In colonial America, both the Puritan and the Anglican models were practiced, with the Puritan conceptions of marriage dominating the New England colonies and the Anglican in Southern colonies. The liberality of divorce law hence took on a North-South aspect with the most liberal divorce law in the New England colonies and the most conservative in the South. Politicians and clergymen of both regions, however, wanted to see their citizens married. Early

¹¹ P.K. Virdi, *The Grounds for Divorce in Hindu and English Law: A Study in Comparative Law*, (Jawaharnagar, Delhi: Motilal Banarsidass Publishers, 1972), 46.

¹² VanBurkleo, 14.

government regulations focused on the family unit as the central institution of social order; in the eyes of the law, unmarried people could too easily escape the discipline of the law. As VanBurkleo explains, “The well-being of political society seemed to depend on the ongoing stability of ‘little commonwealths.’”¹³ In the American colonies, the state had an interest in regulating marriage because they believed if they controlled the family, they would have order in society.

A central aspect of that marital order was the hierarchical status of husband and wife, summarized in the concept of coverture. Coverture was a way of describing a woman’s legal status after she married. As legal historian Hendrik Hartog asserts,

It [coverture] named the condition of a married women, who at common law was a ‘feme covert,’ a woman covered over by her husband. In Blackstone’s paradigmatic words, ‘the very being or legal existence of the wife’ was suspended ‘during the marriage, or at least’ was ‘incorporated or consolidated into that of the husband: under whose wing, protection, and cover’ she performed everything.¹⁴

Under coverture, a man could not grant anything to his wife or enter into a contract with her. In exchange for gaining absolute control over his wife and any property she brought into the marriage, the husband was bound to support her. Coverture also meant that a husband had the right to “correct” his wife, since he was legally responsible for her behavior. Because of these policies, women were subjugated to a position of subordination that made them particularly vulnerable to marital abuse. Under these circumstances, the possibility of divorce was of particular importance to women.¹⁵

¹³ *Ibid.*, 13.

¹⁴ Hendrik Hartog, *Man and Wife in America: A History*, (Cambridge: Harvard University Press, 2000), 115.

¹⁵ Hartog, 115-116.

In colonial America, absolute divorce with the right to remarry was a real possibility only in the New England colonies dominated by Puritan thought. As the historical geographer Mary Somerville Jones concludes about the significance of the Puritans' religious views, these colonies "readily accepted the concept of absolute divorce for serious marital offenses, which had been elaborated by such leaders as Luther, Calvin, and Wesley. Therefore, New England colonies permitted divorce, which could be granted by civil courts, the legislature, or the governor."¹⁶ The most widely accepted grounds for divorce in the 1600s were adultery, desertion (5 years), impotence, fraudulent contract, consanguinity, and bigamy.¹⁷

This is not to say, however, that divorce was common in the New England colonies. Even though Massachusetts and Connecticut had liberal divorce laws for that time, the two colonies, with a combined population of 110,000, recorded a total of eleven divorces during the 1690's. During a fifty year period in the 18th century, from 1738-1788, that rate sharply increased with the Connecticut legislature granting 390 divorces. Even though divorce statistics from this period are unreliable, this number when compared with the surrounding colonies proved Connecticut granted substantially more divorces than other New England colonies. During this same period of time, Massachusetts granted approximately 192 divorces. As least one historian believes that Connecticut had become a magnet for persons from other colonies desperate to get a divorce. Mary Somerville Jones maintains that it "is possible to surmise that even at this early date Connecticut was granting some out-of-state divorces, probably to New York residents, since it was for many years the only state in New England allowing divorce for the all-encompassing omnibus clause."¹⁸

¹⁶ Jones, 17.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 18. The omnibus clause allowed a petitioner to prove that there had been a marital breakdown.

What is abundantly clear from the New England record is that women were more likely to take advantage of the possibilities for divorce than were men. Records from the 1620s to the turn of the 18th century in six New England colonies (Massachusetts Bay, Plymouth Rock, New Hampshire, Connecticut, New Haven, and Rhode Island) show that women petitioned for divorce two-thirds of the time. Specifically, men petitioned for divorce thirty-one times while women petitioned sixty-seven times.¹⁹ In these petitions the primary cause listed for the divorce differed between the male and female petitioners. The primary cause in cases petitioned by men was adultery, while in cases that were petitioned by women, desertion was the most common reason given.²⁰ Women petitioning for divorce looked to escape from poverty or abuse, while men cited their wives' infidelity or rebellion against their patriarchal authority in their petitions.²¹

Of all the colonies, the Southern colonies were the most conservative. These colonies were dominated by the practices of the Church of England which did not allow absolute divorce for any reason. These colonies did, however, break from Anglican church law by allowing chancery courts, which Glenda Riley defines as "separate courts of equity that adjusted cases overlooked by common law and statutes," to grant limited divorces or what was commonly referred to as a "divorce from bed and board," or what would now be referred to as a legal separation.²² The grounds for granting limited divorces were limited to adultery, desertion, and extreme physical cruelty. South Carolina and Virginia, for example, only allowed couples the option of annulment or permanent separation. Spouses in Maryland could use the chancery court to obtain a separation only if they could prove extreme cruelty or abandonment had occurred. In

¹⁹ Additionally during this period, twenty-one people petitioned for either an annulment or legal separation from their spouse.

²⁰ Phillips, 243.

²¹ VanBurkleo, 15.

²² Glenda Riley, "Legislative Divorce in Virginia, 1803-1850," in *Journal of the Early Republic*, Vol. 11, No. 1 (Spring, 1991), 51-52.

none of these situations was the possibility of remarriage sanctioned; the “divorce in bed and board” lasted until one of the partners was deceased. In each action, the chancery courts issued “separate maintenance orders,” less out of concern for women than to insure that the husband continued to support his wife and thus spare the community of the expense of her support.²³

Once again, the records indicate a gender differential. Virtually all of petitions for separate maintenance suits in the Southern colonies were initiated by women. Women usually had good cause for requesting maintenance. Men could try to separate from their wives without paying anything so they did not have anything to gain by filing a suit; however, women could and did sue their husbands in order to regain control of their dowries or a portion of their husband’s estate. The ability to sue for separate maintenance in a court of chancery helped women disadvantaged by coverture to regain desperately needed financial relief when their lives were jeopardized by absent, cruel, or adulterous husbands. Riley found that most separate maintenance cases in Virginia were filed for on the grounds of cruel behavior by the husband. In 1700, for example, Elizabeth Wildy, the wife of a landholder and local county official, filed for separate maintenance contending that her husband “had beaten her, held her in the fire, and threatened to shoot her.”²⁴ The court ruled that her husband had to pay her an annual case payment for his actions. In short, Virginia women separated from their husbands used the court of chancery to gain some sense of financial security, even though they were denied that possibility of absolute divorce.

The strictness of colonial divorce law does not, however, reflect actual practice. As VanBurkleo has noted, in reality the colonists, particularly men, could practice a “fluid

²³ *Ibid.*

²⁴ *Ibid.*, 52-53.

conception of marriage.”²⁵ It was relatively easy for a man simply to walk away from a marriage. Others might have left behind a family in England and established new ones in the colonies. One such scenario might occur when a man moved to another colony and started a new family. In doing so, he would leave his family behind in the care of the local community. As VanBurkleo contends, “The risk of bigamy charges were small, and the social and economic cost of bad marriages were steep. Alternatively, couples might undertake customary divorce (for instance, by returning rings in the presence of witnesses) and notify officials of the deed, but the practice weakened state control over families and was discouraged.”²⁶ Certainly, lawmakers fought against this notion of fluid marriage. In the Massachusetts Bay Colony, officials went so far as to deport men if they feared they were being unfaithful to their wives back in England or were taking an additional spouse. Additionally, lawmakers singled out men who performed lewd acts, attempted marriage, or lived under suspicion of uncleanness and ordered them to return to their wives or pay a hefty fine. Therefore non-Anglican lawmakers allowed divorce in order to assist sensible remarriages as well as to strengthen political control over marriage and to discourage flight from their colony.

The provision for divorce was particularly important to women who, if abandoned, faced an uncertain future. Under coverture, the couple’s property did not belong to her, her children were not legally in her custody, and the possibility of destitution was all too real. Both the separate maintenance agreements allowed in the South, and the absolute divorce allowed in New England, offered a way out of an impossible situation. As VanBurkleo notes, “In the main, judges aimed less to ensure individual happiness than to bolster the family’s ability to maintain

²⁵ VanBurkleo, 14.

²⁶ *Ibid.*

social order, educate dependents, and produce wealth.”²⁷ Divorce provisions were therefore a tool to be used when poorly kept women or children were going to become wards of the state or if a household seemed to be undermining political authority.

By the Revolutionary period, new political thought began to affect some of the thinking on divorce. One of the most notable thinkers in this regard was Thomas Jefferson. As Glenda Riley notes, “Virginia attorney and patriot Thomas Jefferson, for example, coupled ideas regarding independence and happiness to divorce some years before he presented a similar argument for terminating America’s relationship with England in the Declaration of Independence.”²⁸ Jefferson’s notes from the early 1770s regarding a requested divorce by a couple after nineteen turbulent months of marriage showed that he attempted to link revolutionary ideas and divorce in order to persuade the Virginia legislature to dissolve the marriage. Even though Jefferson never presented his case to the legislature due to the husband’s death, the divorce petition he prepared in the early 1770s employed the same principles that he would later use to justify the revolution.²⁹

Because Virginia law only allowed the legislature to grant separate maintenance decrees, Jefferson prepared a legal brief to convince the legislators to expand the policy to grant an absolute divorce. According to Riley, Jefferson’s argument combined the following: the “Puritan argument that marriage and divorce were civil matters, Lockean arguments against indissoluble contracts, and emerging American attitudes regarding women. He applied such terms as liberty, natural right, equality, and dissolvable contract not to the plight of the American colonies, but to an individual citizen caught in a distressing marriage.”³⁰ Jefferson’s stance on

²⁷ *Ibid.*, 15.

²⁸ Riley, 53.

²⁹ *Ibid.*

³⁰ *Ibid.*, 54.

divorce reflected the changing trend in America. Through his notes in this case, he clearly showed how American divorce laws and sentiments toward divorce had gradually broadened.

Jefferson understood how important the option of divorce was to women. Riley explained, “Jefferson commented that divorce ‘restores to women their natural right of equality’ and that it was ‘cruel to confine Divorce or Repudiation to [a] husband who has so many ways of rendering his domestic affairs agreeable, by Command or desertion, whereas [a] wife [is] confined and subject.’”³¹ When allowed, divorce gave women a more level playing field. In too many cases, men would just walk out on their families. Divorce helped women to regain their dignity and financial security. In colonies that permitted divorce, the numbers of divorce petitions introduced continued to increase throughout the 18th century and post-Revolutionary lawmakers began to reconsider laws concerning divorce.

One crucial debate focused on whether divorces should be decided through legislative or judicial means, that is, the question of whether divorce should be dealt with through the civil courts, or whether divorce could only be granted through a special bill passed by a legislature. For example, in 1803, the Commonwealth of Virginia ended its long ban on absolute divorce when the Virginia General Assembly terminated a marriage and thus enacted the first legislative divorce within the state. Virginia legislators saw that separate maintenance agreements failed to solve couples’ problems. In addition to solving the issue of the type of divorce their state would offer, the legislators had to decide how divorce proceedings would occur. Riley maintains, “After briefly considering a bill placing jurisdiction for divorce in chancery courts, Virginia legislators followed the lead of English authorities by placing jurisdiction in the legislature,

³¹ *Ibid.*

perhaps so they could control the numbers of divorces and types of pleas.”³² Common reasons behind requests for divorce in Virginia include adultery, giving birth to a mulatto child, cruelty, and abandonment.

With the exception of South Carolina, other southern states also accepted the practice of legislative divorce. Riley contends that this was not as big of a departure from English Common Law as one would think. She argues, “This was not the break from English practice that it appears to be, for beginning in 1670, the English Parliament began to grant infrequent absolute divorces. Southern leaders replicated this practice by limiting the power to grant divorces to state legislatures just as English practice limited divorce jurisdiction to Parliament, the national legislature.”³³ Maryland was the first state to grant a divorce in the post-revolutionary period. The Maryland state legislature established the precedent of legislative divorces in 1790 when they granted a divorce to a couple when the wife gave birth to a mulatto child.

Legal scholars questioned whether legislative divorces violated the contract clause of the Constitution, which impaired legislative involvement in the obligations of contracts. As VanBurkleo puts it, “Although lawyers disagreed about the clause’s application to public agreements, few doubted that it proscribed meddling with the rights enshrined in private contracts, of which marriage seemed to be one type. If divorce acts altered or destroyed property rights, moreover, they might run afoul of constitutional prohibitions against ‘takings’ and ex post facto legislation.”³⁴ As early as the 1810s, scholars debated this issue. In 1819, Supreme Court Justice Story mentioned this debate in his dissenting opinion in the *Dartmouth College v Woodward* case. While this case did not mention divorce, it focused on the contract clause of the

³² *Ibid.*, 56.

³³ *Ibid.*, 55.

³⁴ VanBurkleo, 69.

Constitution. In his dissenting opinion, Justice Story told legislators that private divorce acts might be a violation of the contract clause of the Constitution which explicitly barred legislative interference in contractual obligations. VanBurkleo comments, “While arguing *Dartmouth*, counsel for New Hampshire had observed in passing that legislative divorce threatened the rights inherent in marital contracts. Story seemed to agree: a married couple had property rights in their union” rights that legislative interference threatened.³⁵ Story’s main concern was the “rights” of husbands, but he also noted that marriage was “a civil institution” that occupied a special status under the law.

Before the issue was decided most legislatures began to move away from the practice because of its sheer impracticability. Cases presented to state legislatures for divorce often required a great deal of investigation before the case could be decided. These cases diverted the legislators’ time and energy away from state issues and forced them to focus on divorce proceedings. Riley quotes a Louisiana legislator who in 1806 “recommended that the territorial legislature be relieved of ‘the irksome, disagreeable and laborious task, or tedious investigation’ so that it could pursue ‘objects of greater importance.’”³⁶ Similarly, by 1827, Virginia legislators were so bombarded with requests for divorce each legislative session, they began to shift part of the divorce petitions over to the chancery courts.³⁷ By 1827, divorce jurisdiction in Virginia began to shift from legislative to courts of chancery in order to hear cases of marital upheaval and to relieve some of the congestion of divorce legislation. By 1850, the legislature had turned all power for granting divorces over to the chancery courts.³⁸ Three years after this shift in jurisdiction, the Virginia legislature adopted new legislation that expanded the grounds for

³⁵ *Ibid.*

³⁶ Riley, 56.

³⁷ Chancery courts are also known as courts of equity.

³⁸ Riley, 51-52.

absolute divorce. Virginia now recognized the following grounds: “adultery, impotency, confinement in a penitentiary, conviction of an infamous offense prior to marriage, willful desertion for five years, pregnancy of the wife at the time of the marriage by a person other than the husband, and a wife working as a prostitute prior to the marriage without the knowledge of the husband.”³⁹ Maryland followed a similar pattern. The number of divorce cases presented to the legislature in Maryland were similar in number to the cases presented to the Virginia legislature; therefore, in 1842, the legislature passed jurisdiction for divorce to the chancery courts. Additionally, the Maryland legislature amended their state constitution in 1851 to prohibit legislative divorces.

The transition from petitioning for divorces from the legislature to the judicial court system occurred gradually, but in the end women benefited from this change because it dramatically affected the ability of women to get a divorce. It was difficult for women to gain a legislative divorce, because such divorces were expensive and hard for a woman living in a state of coverture to obtain. Women would usually have to secure the help of a male sponsor such as a close male relative to help them through the process of a legislative divorce. A situation such as this would most likely occur in the propertied middle to upper classes and the primary aim would be to secure an advantageous property settlement. The risks were considerable. Even so, women in Virginia petitioned for divorce in larger numbers than men did. Riley found that between 1802 and 1850 the Virginia legislature granted 135 divorces, fifty-one percent (69 divorces) of those divorces went to women while forty-nine percent (66 divorces) were granted to men.⁴⁰ Women who were granted an absolute divorce from the legislature returned to *feme sole* status and were guaranteed a measure of financial independence from their ex-husband. If a

³⁹ *Ibid.*, 67.

⁴⁰ *Ibid.*, 60-61.

family was poor, a legislative divorce was not a real option and the more common practice would be for one spouse, typically the husband, simply to leave. Poor women, therefore, faced almost certain destitution and, without a divorce, their ability to act on their own behalf was severely constrained. When states began to shift from legislative to judicial divorces, the court system saw an increase in the number of divorces primarily because it was easier for women to use the divorce process.

The gradual easing of divorce restrictions ignited considerable debate. By mid-century, the developing women's rights movement triggered much of the controversy. Women who had been involved in the abolition movement began to compare the situation of a marriage under coverture to chattel slavery. While some portrayed marriage as an institution of society in which the status of the parties was created and controlled by the law, Elizabeth Cady Stanton and other radical women's rights advocates wanted to eliminate public involvement in marriage and divorce. Stanton insisted that marriage was strictly a contractual obligation between men and women. As VanBurkleo elaborates, "By constituting women and men as parties to contracts, radicals weakened men's claims to exclusive control of both the marital estate and dependents' labor; neither women nor their labor could be said to belong to 'masters' if couples could strike up binding agreements as equals."⁴¹ Furthermore, these radical women advocated for equal contract rights—essentially the end of coverture—to negate women's status as chattel.

The implications for divorce law were huge. To consider marriage as only a contract between two individuals went far beyond the liberalization of domestic relations and divorce law than most legislators and jurists were willing to accept. On the one hand, as VanBurkleo suggests, "Liberalized domestic relations and divorce law—like the streamlining of law codes in

⁴¹ VanBurkleo, 68.

general—facilitated commercial development, the efficient deployment of capital, and the orderly rearing of an educated labor force.”⁴² However, extreme liberalization of law codes disrupted corroding notions of male sovereignty and marital sanctity. In response to this threat, VanBurkleo notes that, “By the 1850s, as antislavery agitation increased and women geared up for a rebellion, legal scholars had begun to recast the marriage contract primarily as a social institution, or ‘status.’ In so doing, they deemphasized its relations to the law of contract (which governed market relations), labored to distinguish it from slavery, and underscored its social consequences.”⁴³ She further contends that this debate between emphasizing marriage as “status” and downplaying marriage as a “contract” became the driving force for judicial divorce and propelled Americans toward “the notion of marriage as a social institution infused with vested rights and public interest.”⁴⁴

Hendrik Hartog concurs. He argues that between the years of 1790 and 1850, American case law had three options when dealing with martial exits. He explains these three powers, “the power to declare one spouse ‘guilty’ of conduct that freed the other spouse from her or his commitment to stay in the relationship, the power to rule on the legality or illegality of a separation, and the power to prevent marriage. Each framed the doctrinal expression of a distinct mode of exit: of divorce, of separate maintenance agreements, and of abandonment and informal separation.”⁴⁵ Together these were the three options for husbands and wives who wished to end their marriages. In the case of divorce in particular, when an individual petitioned the court for a divorce, he or she more than likely wanted the divorce for a very private reason. But in

⁴² *Ibid.*, 67.

⁴³ *Ibid.*, 68.

⁴⁴ *Ibid.*, 69.

⁴⁵ Hartog, 64.

nineteenth century America, divorce was not private. In the eyes of judges and legislators divorce was “a public process available only for public reasons.”⁴⁶ Hartog further explained:

For judges of the early nineteenth century, divorce was a species of public law, a public remedy for a private wrong. If a husband and wife agreed to divorce because they, as private individuals, wanted a divorce, their agreement, all by itself, was reason enough to deny the divorce. ...A couple would be divorced because one or the other had so violated a public and legislatively defined norm that it became important for the moral identity of the innocent spouse to be freed from identity, or unity, with the other. The ‘innocent’ party ‘prosecuted’ a divorce. The guilty party had committed a ‘crime.’”⁴⁷

The judges and legislators had a vested interest in maintaining marriages; however, they understood that in some circumstances divorce might be the best option for the public. Divorce laws were not intended to allow the couple to escape their identities formed through marriage, but rather to punish the spouse who violated the union with their guilty conduct. Divorce laws were present to help the “innocent” spouse escape any moral contamination that would occur if they continued to live with the guilty spouse. As Hartog concludes his explanation of nineteenth century divorce, “In a world where marital unity meant something, it was important divorce exist. At the same time, it was still more important that divorce not be understood as a form of voluntary exit available to all married couples.”⁴⁸ The liberalization of divorce law posits marriage as a contract between two individuals, but once those two individuals were married, they were no longer simply two individuals. Once married, they represented status positions in a union that the law recognized as something in particular that had to be preserved. Divorce was

⁴⁶ *Ibid.*, 70.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 76.

permitted as an option to end the marriage only when the union was being violated and the law required that one of the parties be held responsible for the rupture.

VanBurkleo has analyzed the results of these legal concepts and argues that “the remapping of marriage as a predominantly social institution infused with the public interest put women at the mercy of many common law judges who were known to be hostile to divorce, and legislators often granted judges extraordinary discretion in divorce cases.”⁴⁹ Most judges and members of the population still held the belief that each family unit worked as a model of government. Within each family unit, the male was supreme. If the male could maintain order within their household, the unit would be productive. Furthermore, each productive family unit helped to contribute to the overall growth of the state. Thus, the state had a vested interest in maintaining the sanctity of male sovereignty in the household. Overtime this would change, but this was the reality of nineteenth century family life and divorce law. As the numbers of divorces increased, some states even took action to discourage women from suing for divorce. North Carolina lawmakers, for example, began to revise family law in the 1870s. They did so in a way that favored the husbands. These new statutes encouraged women to stay in their marriages by allowing them to sue for alimony without obtaining a divorce. The grounds for which a person could sue for divorce also changed. As VanBurkleo explains, “While adultery and impotence continued to be the sole grounds for dissolution, male ‘adultery’ came to be defined as sexual misconduct combined with abandonment. Elsewhere, legislators sometimes yielded to conservative pressure and scaled back statutes that had permitted judges to exercise considerable discretion.”⁵⁰ The results of these actions limited women who could file for

⁴⁹ VanBurkleo, 71.

⁵⁰ *Ibid.*, 166.

divorce. They had to have been abandoned or emotionally terrorized in order to have grounds to file for divorce.

These conservative alterations in divorce law made the relative liberality of western legal codes regarding divorce even more dramatic. First, the divorce laws of the West provided for a greater number of grounds for divorce, and hence, provided women (and men) with more options and a greater ability to use the law. Also, western divorce laws had shorter waiting periods for establishing residency and for finalizing divorces. The reasons for this openness are not entirely clear, but most historians believed that it stemmed from the uncertainties of western life. Men and women faced difficulties unknown to the settled life in the East. Divorce became a remedy for women especially when their husbands abused them or abandoned them. Abandonment and extreme cruelty were the top two reasons listed on divorce petitions in the west. As one of the earliest examples, the state of Illinois provided both men and women with liberal access to divorce. In that state the circuit courts had held jurisdiction over divorce since 1819 and the state legislature banned legislative divorces in any capacity in 1839. In particular, Illinois followed, Indiana as the first states to pass an omnibus, or incompatibility, clause. After the passage of the omnibus clause, the courts “allowed petitioners to obtain divorces for any misconduct that resulted in unhappiness and destroyed the marriage relationship.”⁵¹ Historian Stacy Pratt McDermott argues that many Illinois women used divorce when in a situation of marital difficulty.⁵² She also believes that such “situations” were actually encouraged by the legislature. She contends that the system of patriarchy had shifted to a system of paternalism in Illinois: “A paternalistic interpretation suggests that Illinois legislators carefully crafted divorce law in order

⁵¹ Stacy Pratt McDermott, “Dissolving the Bonds of Matrimony: Women and Divorce in Sangamon County, Illinois, 1837-60,” in Daniel W. Stowell, ed., *In Tender Consideration: Women, Families, and the Law in Abraham Lincoln’s Illinois*, (Chicago: University of Illinois Press, 2002), 74.

⁵² *Ibid.*, 71.

to protect women legally, economically, and physically, because they perceived women as incapable of protecting themselves. Illinois legislators recognized divorce as a necessary remedy for women and instituted a divorce law that was strategically designed to protect them.”⁵³ Illinois became a popular place for couples to get divorced, because the Illinois circuit courts applied divorce laws liberally. By 1860, the state of Illinois had the highest number of divorce decrees in the nation.

This pattern was followed elsewhere in the west. Western states that became known as divorce mills either had a shorter waiting period, a larger number of grounds that could be used to petition for divorce, or an omnibus clause. The state of South Dakota, for example, shortened their waiting period to six months, and like most western states had numerous acceptable grounds for divorce. The distinction between east and west states clearly showed how western states allowed their restless, mobile residents an easier way to obtain a divorce.⁵⁴ This shift in jurisdiction also symbolized, as Richard Chused argues, “the lessening role of families as a central organizing force of religion, politics, and the economy.”⁵⁵ The patriarchal system within American society was changing.

Such changes did not indicate that married women had somehow assumed equality under the law, however. Divorce remained controversial as most Americans still viewed marriage as a lifetime commitment. But the relative openness of western states certainly allowed women a greater opportunity to use the law in their own behalf. Kansas was no exception to the western pattern. In its first decade of statehood, Kansas recognized ten grounds for divorce and in

⁵³ *Ibid.*, 74.

⁵⁴ *Ibid.*, 73.

⁵⁵ Richard H. Chused, *Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law*, (Philadelphia: University of Pennsylvania Press, 1994), 11.

addition, protected the property rights of married women. As we shall see, some women were eager to use those provisions for their own purposes.

CHAPTER 2 - Changes in Kansas Divorce Law

With the passage of the Kansas-Nebraska Act on May 30, 1854, the territory of Kansas was open to settlement. In October of 1859, the delegates to the Constitutional Convention passed the Wyandotte Constitution that was then sent to the federal Congress for approval. After the House and Senate approved this Constitution, Kansas became a state on January 29, 1861. From the beginning of the statehood, Kansas women possessed certain rights to property, custody of children, and divorce. In article fifteen, section six, the Kansas Constitution states, “The Legislature shall provide for the protection of the rights of women, in acquiring and possessing property, real, personal and mixed, separate and apart from the husband; and shall also provide for their equal rights in the possession of their children.”⁵⁶ It was unique for a state to explicitly state that it was protecting the rights of women at this time. Divorce law in Kansas also protected women.

By the time Kansas was formed, the cult of true womanhood was deeply ingrained within American society. The cult of true womanhood established a structure for societal order. Under this ideology of domestic life, a “true” woman was one who possessed the virtues of piety, purity, submissiveness, and domesticity, and her role within the home provided the moral ballast for the male, public world of competition. This ideology assumed the dependence and submissiveness of women, and it also assumed that, at least in theory, women could rely on male protectors.⁵⁷ The ideology, in effect, obscured the real disadvantages that women suffered under coverture. By mid-century, some reformers believed that the formation of the state of Kansas

⁵⁶ Wyandotte Constitution, Kansas State Historical Society, <http://www.kshs.org/research/collections/documents/online/wyandotteconstitution.htm#article15>.

⁵⁷ Barbara Welter, “The Cult of True Womanhood: 1820-1860”, *American Quarterly*, Vol. 18, N. 2 (Summer 1966), 152.

presented an opportunity for change. Through her work and the work of other women's rights advocates, the Kansas territorial legislature gave women the right to own property, the right to sue for divorce, and the right to possess sole custody of their children. Furthermore, the statutes of the Kansas Constitution ended the portion of coverture that children belonged equally to their mothers and fathers. If custody with father was not in the best interests of the child, the mother could retain full custody. Kansas was one of the first states to give these rights to women. For women, this step was a shift away from the cloak of coverture and the cult of true womanhood towards equal rights. From the original territorial statutes to the new state statutes, the law protected Kansas women's ability to petition for divorce, and as guaranteed in the state constitution, the right to acquire and possess property.

One woman who was central to the fight for Kansas women's rights to own property and obtain a divorce was Clarina Nichols. Originally from southern Vermont, Clarina Howard Nichols traveled to Kansas in 1854 with her two oldest sons in order to scout out the Kansas territory, leaving behind her second husband and youngest son and daughter. She explained that she did not want to drag the whole family to Kansas if it was not going to be a permanent move. Clarina came to Kansas with the New England Emigrant Aid Society. One reason why they moved was because Clarina had become frustrated with the stagnant attitude of people in New England towards women's rights. In Diane Eickhoff's biography of Nichols, *Revolutionary Heart*, she contends, "Nichols saw that resistance was growing to progressive legislation for women in her home state. In her mind, New England was comprised by its history, while Kansas—where the laws were yet to be written—could devise its future from scratch."⁵⁸ Nichols advocated for women's rights in this new territory. Once she and her sons were settled in

⁵⁸ Diane Eickhoff, *Revolutionary Heart: The Life of Clarina Nichols and the Pioneering Crusade for Women's Rights*, (Kansas City: Quindaro Press, 2006), 99.

Lawrence, she returned to Vermont to ready the rest of her family for the move to Kansas. In the spring, the family homesteaded four plots of land on Ottawa Creek. Just as the family was beginning to get settled in to life in Kansas, Nichols' second husband, George, weakened from a farm accident, caught a severe cold or pneumonia and died in late August of 1855. For twelve years Nichols had known what it was like to be married to a decent husband. She once wrote to Susan B. Anthony about how lucky she was to have found George.⁵⁹

Nichols' second marriage was a stark contrast to her first marriage. She had married Justin Carpenter who was ten years older than she was in April of 1830. Early in their marriage she became involved in several reform movements; first, she experienced the Second Great Awakening and then was involved in the Temperance Society. Her husband also threw himself into the temperance movement. For a while the couple worked for these reforms together. However, by 1832, Justin Carpenter began to struggle both professionally and personally. While Clarina never recorded exactly what went wrong in the marriage, she soon became the breadwinner of the family. They moved to New York City in hopes of Justin finding success in the city, but failure followed him to the city as well. For the next few years, Clarina lived a vagabond life traveling between Vermont and New York City providing for the family by sewing and teaching at a school for girls. Clarina had no support or love in her marriage. By 1840, Clarina had permanently returned to Vermont with her children. While in Vermont she began writing for a local paper where she met George Nichols, her second husband. George owned and edited the *Windham County Democrat*. Before she could marry George, Clarina had to officially dissolve her first marriage. Eickhoff clarifies, "On February 16, 1843, she was granted a divorce from Justin Carpenter on the basis of 'cruelty, unkindness, and intolerable severity.' Though

⁵⁹ *Ibid.*, 115.

divorce was not unheard of in those days and was more easily obtained in Vermont than in many other states, it was still uncommon enough to raise eyebrows in most locales.’⁶⁰ Clarina chose to keep her divorce quiet in order not to embarrass Justin’s family. She then married George on March 6, 1843. A few years later Justin Carpenter died of typhus in New York City.⁶¹

Once Clarina was fully involved in the women’s rights movement she used her personal experiences as material for lectures. Nichols identified with women in desperate circumstances. Through her experiences she understood what it took for a woman to have to worry about how to feed her family and pay bills. Nichols contended that the root of the problem was the lack of rights for women. Eckhoff explains her position,

Once a woman said ‘I do,’ she may as well have added, ‘I do hand over to my husband my property, my money, and all my earthly possessions. He may do with them as he wishes.’ The quilt her mother made for her, the horse her father gave her, the wedding dress she bought with her own earnings—all these now belonged, legally, to her husband. He could sell, gamble, or give them away, as he chose, and his wife could not object, for she was under her husband’s legal control. In the eyes of the law she did not exist. ...Gradually, Nichols came to believe that married women could never achieve security for themselves and their children unless they had economic rights—the legal right to own and control their own property and wages.⁶²

After moving to Kansas, Nichols wanted to help women gain rights to own property and petition for divorce. She believed that this new territory had the opportunity to help women by providing these legal rights and she was going to work to achieve these rights.

⁶⁰ *Ibid.*, 39.

⁶¹ *Ibid.*, 39-40.

⁶² *Ibid.*, 45-46.

In Kansas, a fourth constitutional convention was called in Wyandotte City during the summer of 1859. Prior to this convention, Clarina Nichols traveled around the state speaking and asking people to sign a petition promoting women's rights. Then she attended the convention where she lobbied the delegates and wrote resolutions on women's rights. She lectured twice in Constitutional Hall, once just to the Republicans and once to all the delegates. Later in the convention, Nichols' resolution for full women's suffrage was voted down; however, she succeeded in getting several other rights for women written into the constitution. Eickhoff elaborates, "From the first, Kansas mothers had equal custody considerations with fathers in cases of divorce. Married women had the right to inherit, control, and bequeath property in their own names. ...Perhaps the most significantly in terms of political advances, Kansas women could vote in school district elections."⁶³ Due to Clarina Nichols's efforts, from the formation of the state, Kansas women had more rights than was typical of women in eastern states. She fought tirelessly for women to have the right to own property and to petition for divorce.

Divorce law in Kansas transitioned from the territorial statutes to the state statutes following Kansas's bid for statehood. During the period of Kansas history from 1861 to 1923, the legislature revised the divorce statutes on three occasions. The first changes occurred in 1868, then next in 1909, and the last changes occurred in 1923. The 1909 changes to this statute led to controversy over the residency requirement before a divorce petition would be granted. Before examining the specific state statutes relating to divorce, first it is necessary to establish how the district court system evolved to be the judicial body that decides divorce cases in Kansas.

⁶³ *Ibid.*, 152. The new Kansas constitution also advocated for "equality in all school matters" for women. This meant that the University of Kansas was coeducational from its founding and one of the first public universities to admit women.

The procedure to file for divorce in the late nineteenth century revolved around the district court system. In a study by William B. Fenton, he outlined the history of the Kansas District Court system and explained the importance of the district court system in maintaining citizens' individual rights and freedoms. In Kansas, the courts with original jurisdiction in civil or criminal cases are the district courts. This was why the district courts settled divorce proceedings.

The history of district courts can be traced back to the English ancestry of American law. King Henry II of England set up local courts presided over by the local sheriff. While these local courts did hear cases dealing with crime and debts, they also handled cases relating to administrative, military, and financial issues.⁶⁴ While it is clear that the United States court system derived from these ancient courts, the American colonists did not completely imitate these courts when they established the court system in the New World.

William Fenton argues there were geographic, demographic, and political considerations that necessitated the modifications from the English court system. The colonial settlements in the New World were small with limited populations. The populous did not need an elaborate court system. In the early years, the Governor and his Counsel made up the court. The court system in the early years of the colonies included both criminal jurisdiction and civil jurisdiction in one superior court of original jurisdiction. In the eighteenth century, the colonies established circuit courts. Fenton argued the desire for a uniform system of justice prompted the establishment of circuit courts in America as there had been in England.⁶⁵

⁶⁴ William B. Fenton, *District Courts in Kansas, Governmental Research Series No. 28*. (Lawrence: University of Kansas Publications, 1964), 1.

⁶⁵ *Ibid.*, 10.

Following the revolution in 1776, the new states established their own court systems. Most state constitutions created a court with specific jurisdiction and then allowed the state legislatures to establish the lower courts. Fenton explains, “The Kansas Constitution provided for a Supreme Court with defined original jurisdiction. The Legislature was given authority to define the jurisdiction of the district courts (except over divorce, already granted them) and to designate the times and places where the district judges would hold court.”⁶⁶

Each state also established the qualifications and selection procedure of judges for these general jurisdiction or district courts. Prior to 1830, judges were usually appointed by the governor of the state and then approved by the legislature.⁶⁷ The people accused the governors and legislatures of using their influence to reward political friends. Because of the shift in political thought during the Jacksonian era, states began to abandon the procedure of appointments in favor of judges being elected by the people. The framers of the Kansas Constitution adhered to this Jacksonian philosophy. They concluded that district court judges would be elected by the votes within each district and would hold office for a term of four years.⁶⁸

In 1854, Congress created the first formal government in what is now the state of Kansas by establishing a territorial government. The act formed the territorial court system and allocated judicial power. The territorial courts included a Supreme Court with a Chief Justice and two associate justices all of whom were appointed by the President with the advice and consent of the United States Senate. They divided the Kansas territory into three districts with district courts located in each. Fenton notes, “In 1855, the Kansas Territorial Legislature gave

⁶⁶ *Ibid.* 15.

⁶⁷ *Ibid.*, 15-16.

⁶⁸ *Ibid.*, 16.

the district courts exclusive jurisdiction in all cases of equity, crime and misdemeanor, civil jurisdiction in suits over \$100, and appellate jurisdiction in all cases from probate courts and justices of the peace.”⁶⁹ The territorial district court system remained in Kansas until the admission of the state into the Union in 1861.

In the period leading up to the admission of Kansas into the Union, three drafts of a constitution were written before the final one was adopted in Wyandotte in 1859. Each of these documents had different ideas for the judicial system. The Topeka Free-State Constitution, written in 1855, did not discuss general jurisdiction courts; instead, it divided the state into three common pleas areas presided over by an elected judge from the area. The Lecompton Constitution of 1857 created a system of circuit courts. Fenton clarifies, “Its authors envisioned a system of circuit courts covering the state with original authority in civil and criminal disputes.”⁷⁰ The third constitution was the Leavenworth Constitution of 1858. In this constitution the court system included a system of circuit courts, but unlike the Lecompton Constitution these courts included equity along with civil and criminal jurisdiction.

In July of 1859, advocates of both abolition and pro-slavery met at the Wyandotte Convention to attempt to create a new constitution that would appease both groups. The Wyandotte Constitution’s judicial article paralleled the Territorial Act of 1854. Fenton contends, “It placed judicial power in ‘a supreme court, district courts, probate courts, justice of the peace and such other courts, inferior to the supreme court, as may be provided by law.’ The state was divided into five judicial districts. Each district was to have its own resident judge, elected by the people of the district for a term of four years.”⁷¹ The legislature determined when and where

⁶⁹ *Ibid.*, 17.

⁷⁰ *Ibid.*, 18.

⁷¹ *Ibid.*, 18-19.

the district courts were held. The legislature was also given the power to create more district courts as the population or geographic area grew. The constitution left the specifics of jurisdiction up to the legislature except it allocated to district courts the power to grant divorces and hear appeals from probate and justice of the peace courts.⁷²

When the district court system was implemented, there were five districts and five judges. However, the number of districts and justices steadily increased. Fenton elaborates, “The practice of more judges than districts, which first appears in 1911, occurred when the 1909 Legislature passed a law stipulating that judicial districts comprising single counties of over 100,000 inhabitants were to have at least two divisions of the district court.”⁷³ Later laws authorized divisions in districts with more than one county and populations of less than 100,000. Until about 1900 the legislature would redefine district boundaries and add new judicial districts according to the increases in population in the western half of the state. During the decade of 1880-1890, the number of districts doubled from 17 in 1881 to 35 in 1889. According to Fenton, “Since 1895 the changes in judicial districts have been intended to reduce the work load in single districts by detaching one or more counties and creating new districts.”⁷⁴ The district court system allowed citizens to bring suit in a timely manner in a court that was relatively close to their residence. Virtually by definition, such courts were more accessible to women.

The district courts were given jurisdiction over divorce by the state legislature. The legislature also outlined the legal grounds for granting a divorce. Kansas established the first divorce law statutes by drafting the territorial statutes in 1855. Through these territorial statutes, the people of Kansas created the framework for the state government that followed in 1861.

⁷² *Ibid.*, 19.

⁷³ *Ibid.*, 21.

⁷⁴ *Ibid.*, 22.

Many of the features outlined in the territorial statutes were copied when the state was accepted into the Union, included the court structure.

The 1855 Statutes of the Territory of Kansas outlined the grounds for divorce. The first set of grounds related to conditions which either were present or should have been present at the time of the marriage included impotency and the existence of a legal wife or husband from a previous marriage. The next set of grounds were actions taken by one party which occurred during the marriage. One spouse had grounds for divorce if the other spouse committed adultery, deserted the other spouse without reasonable cause for a period of two years, was convicted of a felony or other infamous crime, or if they were guilty of cruel and barbarous treatment which endangered the life of the other. The final two grounds for divorce outlined in the territorial statutes stated that if one party offered such indignities to the other person as shall tender his or her condition as intolerable, or the husband shall be guilty of the conduct of a vagrant the other spouse had grounds for divorce.⁷⁵ If any of these previously noted grounds were present in the marriage, the innocent and injured party could obtain a divorce from the bonds of matrimony. The territorial statutes also noted that the divorce would not affect the legitimacy of the children of the marriage.

After a person had grounds for divorce, the territorial statutes also delineated the procedures to petition for divorce. The patron could petition in any court having chancery or equity jurisdiction. In the Kansas Territory, they would therefore petition in the district court. In a divorce proceeding, the defendant was given the opportunity to address the accusations by the plaintiff in the petition. Then the plaintiff was asked to swear in an affidavit stating that to the best of their knowledge the said complaint was not made out of fear or restraint for the purpose

⁷⁵ The Statutes of the Territory of Kansas, Chapter 62, Section 1.

of separating from the defendant, but made in sincerity and truth because of the gravity of the causes mentioned in the petition. The statutes further stipulated the divorce proceedings had to be brought in the couple's district of residence.⁷⁶ Each of these guidelines helped to establish the procedures for divorce proceedings in the Kansas Territory.

The 1868 General Statutes of the State of Kansas summarized the previously mentioned grounds for divorce and reworded the statute so that it was more succinct. The statutes listed the following grounds for divorce: when either of the parties had a former husband or wife at the time of the marriage, abandonment for one year, adultery, impotency, when the wife was pregnant by another man at the time of the marriage, extreme cruelty, fraudulent contract, habitual drunkenness, gross neglect of duty, and conviction of a felony or imprisonment.⁷⁷ This updated statute retained the clause stating the plaintiff must have been a resident in good faith of the state for one year preceding the filing of the divorce petition and must also be a resident of the county in which the action was brought.⁷⁸ Through these updated statutes, divorce law in Kansas remained quite similar to the statutes adapted from the territorial statutes.

In 1868, the statutes established the guidelines for the district court judge to determine fault, property rights, alimony, and child custody as part of a divorce settlement. Furthermore, these changes allowed for a judge to declare a marriage null and void if either of the parties in the marriage were incapable because of age or understanding to enter into the marriage contract. In the final section of these statutes, the law provided state residency to a wife living in the state even if her husband resided elsewhere.⁷⁹ This statute upheld women's rights because it asserted that a wife's Kansas residency took precedence over the coverture assumption that a wife's legal

⁷⁶ The Statutes of the Territory of Kansas, Chapter 62, Section 2.

⁷⁷ General Statutes of the State of Kansas 1868, Ch 80, Article XXVIII, Sec 639.

⁷⁸ General Statutes of the State of Kansas 1868, Ch 80, Article XXVIII, Sec 640.

⁷⁹ General Statutes of the State of Kansas 1868, Ch 80, Article XXVIII, Sec 651.

residence was where her husband lived. This statute provided an example of how Kansas law and the population of Kansas subtly revoked the stronghold of coverture in American marriages. By allowing women to own property, be residents of the state, and petition for divorce, Kansas law stated a woman was legally her own person, not simply subsumed into the legal identity of her husband.

Kansas divorce law allowed women to use divorce for their own individual purposes. Two examples from Clay County, Kansas, provide unusually vivid examples of this possibility. Ida Marion Selts and Bertha Holtzgang were proprietors of prominent businesses. These women were typical in that, like the majority of women who filed for divorce, their husbands had abandoned them. However, they were unique because they fought for their rights to maintain ownership of property acquired during their marriages. Because of the remaining disadvantages of coverture, we may assume that these women both worried that, if their husbands should ever return, they could resume head-of-household status and take over the property and financial assets that each woman had worked so hard for. Divorce provided these women with the legal option to secure their finances in their own names. Thanks to the efforts of Clarina Nichols, these Kansas women could legally retain their family's property. Moreover, it appears that these women did not face social ridicule but instead were accepted into society as prominent women. The liberal Kansas divorce laws allowed these women to break the legal bonds of marriage and prosper in spite of their divorce.

Mrs. Ida Selts was a well-respected member of the Clay Center community and a successful business owner. After her husband abandoned her to be a traveling auctioneer, she petitioned the court for a divorce. It seems likely that Mrs. Selts found her husband's new career to be a threat to the financial security that she had built up for the family through her successful

store. Mrs. Selts was born in 1848 in Ridgeway, New York. She moved west and married Benjamin D. Selts in April of 1866 in St. Paul, Minnesota. The next year the Selts family moved to Clay County, Kansas, to establish a farm in Goshen Township. After the Selts homestead failed three years later, the family moved into Clay Center. Mr. and Mrs. Selts had one daughter who died at about two years of age and one adopted son, Henry.⁸⁰ In 1874, the Selts family began a hotel business, which Mrs. Selts managed.⁸¹ Once the railroad came through Clay Center, the Selts House flourished. It was only during the disastrous grasshopper infestation of the 1870s in which the Selts's did not make a profit. A *Clay Center Times* article commented, "They ran the Selts House for five years,—were there during grasshopper times—and for a while did a losing business, feeding the moneyless hungry once in their flight from the hopper scourged prairies."⁸² Mr. Ben Selts became city marshal and street commissioner after he sold the hotel business in 1880. He also worked as an auctioneer traveling to California, Colorado, and Minnesota.⁸³ Mrs. Selts's own business career took off in 1880 when the family purchased another building in which she established a successful millinery and jewelry store.⁸⁴

The Selts Millinery and Jewelry Store rose to prominence in the Clay Center community. Mrs. Selts's business was so successful that the newspapers noted its anniversary in 1905, the twenty-fifth year of the store's continuous service in business. The article quoted Mrs. Selts's pride in her business, "This year, A. D. 1905, marks the twenty-fifth anniversary of continuous service in business, without ever a change in the name of firm in any way; no doing business in other people's name; no failures, successful or otherwise, and only one move in twenty-five

⁸⁰ *The Times*, 24 August 1911, 1.

⁸¹ *The Times*, "It is Historical," 6 April 1905, 1.

⁸² *The Times*, "Tribute From Her Friends," 5 December 1907.

⁸³ *The Times*, "Ben Selts Dead," 22 October 1903, 1.

⁸⁴ A millinery store sold women's hats and other articles such as lace and ribbon.

years, and that into their large and beautiful rooms, where can be found now the largest line of fine millinery, ladies' tailored suits, waists, skirts, furs, neckwear, and novelties.”⁸⁵

Before she married, Mrs. Selts trained in the millinery and dressmaking business in Illinois. When she began her millinery business, she bought her goods from a reliable Chicago millinery house. For twenty-five years she continued to buy from this same company which was the largest and best millinery house in the United States.⁸⁶ The newspaper article maintained, “Mrs. Selts attributes a large part of her success to the fact that she made a wise choice in the beginning and then knew enough to stick to a reliable house. The business made a steady increase from the very first.”⁸⁷ In 1887, her son Henry took over the growing jewelry department after having studied watch repair for three years. From that point on, the two worked together in the business. After twenty years in the same location, the business needed more space, so the Selts Millinery and Jewelry store moved to a larger building that allowed the Selts to expand their merchandise.⁸⁸ Mrs. Selts clearly possessed an aptitude for business; however, it was also this aptitude for business that led her to divorce her husband.

Seventeen years into her run as a business owner and thirty-one years into her marriage, Mrs. Ida M. Selts petitioned the Clay Center District Court for a divorce from Mr. Benjamin D. Selts. In the Court Petition, Mrs. Selts cited abandonment as the reason behind her divorce petition. She claimed that they had lived together as husband and wife until Benjamin abandoned her in 1890 during which time she had remained a “good and faithful wife,” a standard claim in most divorce petitions.⁸⁹ In her petition before the court, Mrs. Selts based her case solely on the fact that Mr. Selts had not been holding up his part of the union. She claimed

⁸⁵ *Ibid.*

⁸⁶ *The Times*, “It is Historical,” 6 April 1905, 1.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Selts v Selts*, Clay County District Court, Case No. 4386, State of Kansas.

he failed to provide for his family financially. The lack of a detailed response and counter argument from Mr. Selts left the judge with little option but to grant Mrs. Selts the divorce.

There is no reason to suppose that Ida Selts filed this petition with anything other than honest intentions, but it was clear her divorce petition is centered less on the heartbreak of a broken marriage than on a concern about protecting her business and financial assets. Benjamin had left Ida to pursue an auctioneering career. While he was gone, Ida's business became quite successful. It was very possible that Benjamin had left the area for good; however, no one knew if or when he would return. Ida used her divorce petition to legally separate herself from the marriage union, and by doing so, she protected her assets from the possibility of Benjamin's return and his potential claim on the "family's" resources. She used this divorce to make sure that what was legally "theirs" became only "hers."

Another Clay Center wife took similar precautions. Bertha Holtzgang was born in Switzerland where she met and married her husband Carl. Later the couple moved to Germany before immigrating to the United States. In 1868, the pair moved to Clay Center from Germany and in their new community, they established the Holtzgang Drug Store, later known as the Pioneer Drug Store. This business was one of the first three businesses established in Clay Center as well as the first drug store located west of Manhattan.⁹⁰ Carl Holtzgang was an expert chemist, having studied in Germany before immigrating to the United States. Bertha Holtzgang also worked diligently at the Pioneer Drug Store, which she started with her husband. According to her obituary, "She was a registered pharmacist, possessed fine business ability, and took an

⁹⁰ *The Times*, "Bertha Holtzgang Johnston," 30 November 1933, 2.

active part in the city's most praiseworthy undertakings."⁹¹ She worked hard to make their drug store profitable.

For some unknown reason, Mr. Holtzgang moved to Florida without Bertha in approximately 1887.⁹² On February 7, 1895, Bertha Holtzgang petitioned for divorce in Clay County District Court. She claimed that Mr. Holtzgang had abandoned her and her daughter without just cause or provocation. She explained to the court that the couple was married in Switzerland on May 10, 1868 and since that time she had remained a faithful wife, committed to the union of their marriage. Once again the boilerplate language required that she establish her innocence in breaking the marital bond. She asserted that Mr. Holtzgang had ignored his marital vows by abandoning both his wife and daughter in October of 1887. She alleged that from the time of his departure Mr. Holtzgang failed to provide for his family.

In the fifth clause of the divorce petition, Mrs. Holtzgang finally reached the crux of her case. She petitioned for this divorce because she was worried about the couple's property. Mrs. Holtzgang explained that she owned property in her name in Kansas, while Mr. Holtzgang owned property in Florida.⁹³ The Kansas property in question was significant to Mrs. Holtzgang, because she needed the couple's store in order to maintain her financial security. In this case it is significant that Mrs. Holtzgang pointed specifically to the drug store in part of the divorce petition, probably because the pharmacy had so clearly been a jointly developed asset with her husband. Hence part of her request was that the drug store be legally established as belonging to her.

⁹¹ *Ibid.*

⁹² *The Times*, "Holtzgang," 1 July 1909, 1.

⁹³ *Holtzgang v Holtzgang*, Clay County District Court, Case No. 4113, State of Kansas.

The judge granted Mrs. Holtzgang the divorce on March 20, 1895 along with a decree that declared her the owner of all property in her name and further, that she was clear of all right, title, interest or claim of the defendant on this property.⁹⁴ In the judge's statement, he granted the divorce because Mr. Holtzgang had abandoned his family for eight years. The duty of the husband was to provide for the family and Mr. Holtzgang was no longer providing for his family. One suspects, however, that the finding of guilt on the part of her husband was of less interest to Bertha Holtzgang than the title to their Kansas property.

In 1897, Bertha Holtzgang remarried and eventually sold the Pioneer Drug Store and moved to Kansas City.⁹⁵ Even though she did not remain in Clay Center, Mrs. Bertha Holtzgang Johnston was well known and respected for her business ability, fairness, and integrity. Mrs. Holtzgang Johnston's life was a testament to women of the day for their resilient nature and ability to rise above the gender roles of the time by owning a business. When her husband abandoned her, Mrs. Holtzgang used the legal system to her advantage to keep her property and support her daughter.

Both of these Clay Center women had unusual property interests to protect, but in other respects, their situation was typical. Marriage and divorce statistical data from the Bureau of the Census within the Department of Commerce and Labor established that abandonment was the primary reason for divorce in Kansas in 1897. In 1897, Kansas reported a total of 1226 divorce petitions. Of these 1226 petitions, 492 or 40% listed abandonment as the reason for the divorce.⁹⁶ What the statistics cannot indicate is the reason for abandonment. In both Clay Center cases, neither husband responded to the divorce petition, and one must assume that both

⁹⁴ *Ibid.*

⁹⁵ Clay Center Register of Marriages, 175.

⁹⁶ Carol Wright, *A Report on Marriage and Divorce in the United States, 1867-1906*, Parts I-II. (Washington D.C.: U.S. Government Printing Office, 1908-1909), 23.

had availed themselves of the quickest American divorce procedure: simply walking away. Yet Kansas law provided protections for women that made these cases considerably less traumatic than they might have been, and in both cases, a woman was able to use liberal divorce law to retain financial security without a husband. In addition, it appears that neither Mrs. Selts nor Mrs. Holtzgang was socially penalized for their actions. They remained successful businesswomen after their divorce because their community accepted their divorces.

The legal statutes in Kansas remained the same from 1868 until 1909. In 1909, the legislature decided it needed to revise the statutes. In the 1909 statutes, grounds for divorce remained the same as previously written in 1868. However, the legislature strengthened the subsequent qualifications and procedures for a divorce. In particular, the legislature added a section to the statute that addressed the property of the wife. While the 1868 statutes noted that a wife could be restored to her maiden name and her husband may be required to pay alimony, it did not address the property that the wife either brought into the marriage or obtained during the marriage. The 1909 statute provided:

When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before her marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage and the value of his real and personal estate at the time of said divorce; ...payable either in gross or in installments, as the court may deem just and equitable.⁹⁷

⁹⁷ State of Kansas Session Laws 1909, Chapter 182, Article 28, Section 673.

Kansas law from the formation of the state had protected the rights of women to own property, but this addition to the divorce statutes made the protections more specific.

Due to the work of Clarina Nichols, Kansas became a state with liberal laws for women. Women had the right to own property, retain custody of their children and vote in school elections. If Kansas women found themselves in a horrible marriage situation, the liberal Kansas divorce statutes included numerous grounds for divorce. Kansas women like Mrs. Selts and Mrs. Holtzgang used these laws to divorce the husbands who had abandoned them and secured their finances. The liberal laws of Kansas provided more security for women than did the conservative laws of the East Coast states, but perhaps more to the point, those laws allowed for new possibility under the law: female individualism.

CHAPTER 3 - Concerns about Liberal Divorce Law

Statistics compiled by the Bureau of Labor and Statistics showed that women were the primary petitioners for divorce in Kansas. During the forty-year period from 1867 to 1906, Kansas women petitioned the court 25,334 out of the total number of 36,094 or 70.2% of the cases petitioned. The number one cause for divorce was abandonment. 46.5% of the divorce cases in Kansas were filed based on the ground of abandonment. Of the divorces filed by women, 40.9% of them filed on the basis of abandonment. The second highest ground for divorce was cruelty, a charge made in 18.8% of the divorce cases. 23.5% of the cases filed by women used cruelty as the reason behind the petition.⁹⁸ These statistics show that the state of Kansas along with other western states had a problem with men abandoning their wives and families. Since society in the west was more fluid than on the east coast men could simply walk away from their marriages. In many cases, women would be left destitute after their husband abandoned them; therefore, they needed the support of the court system in order to retain their rights to certain property, in order to remarry to keep their family in tact, or to retain custody of their children.

Following the 1909 changes in the state statute, lawyers found that one change in the statutes could possibly lead to an increase in divorces in Kansas. The statute in question was section 664 which required the plaintiff to be a resident in good faith of the state for at least one year preceding the filing of the petition. The statute further required that the plaintiff be a resident of the county in which the legal action was adjudicated. These requirements were retained from the previous statutes; however, following these requirements the statute read,

⁹⁸ Wright, 103-105.

“unless the action is brought in the county where the defendant resides or may be summoned.”⁹⁹

An article in the *Kansas City Star* entitled “Divorces Easy in Kansas: The State May Rival South Dakota Because of a Legal Loophole” illuminated the loophole created by this change. This article published in January 1910 explained how lawyers promptly caught the oversight by lawmakers in this statute change.

The legal loophole in the statute was first noticed by Judge R. J. Higgins, a former district court judge in Kansas City, who wrote to a law professor at the University of Kansas, William E. Higgins, about the problem. The Kansas Bar Association appointed Professor Higgins to the commission assigned to revise the code of civil procedure. Judge Higgins believed the new statute would allow non-residents to obtain divorces easily in Kansas. He pointed to the clause “or may be summoned” as the basis of the loophole. Judge Higgins argued that any couple in any state could take advantage of this clause and “run” to Kansas to get divorced which would lead to many causes of fraud. He contended, ““Any person within the state can be reached by court summons. Suppose a discontented married couple in Iowa should agree to seek immediate separation in Kansas, this is the way they would go about it. Either the husband or wife would come to Kansas and file the suit, alleging that the defendant could be reached by a summons, and then the defendant could make it convenient to be in the state within reach of the summons.””¹⁰⁰

Following these preliminary steps, the couple could return to their home state and wait their court date. South Dakota’s law required residency of six months instead of the standard year before a divorce could even be filed. Prior to the changes in the Kansas statute, the easiest Midwestern state to get a divorce was South Dakota. Judge Higgins worried that now people

⁹⁹ State of Kansas Session Laws 1909, Chapter 182, Article 28, Section 664. Emphasis is mine.

¹⁰⁰ *Kansas City Star*, “Divorces Easy in Kansas: The State May Rival South Dakota Because of a Legal Loophole,” January 9, 1910.

would come to Kansas for the sole reason of a quick divorce; in effect, this statute would in his view increase Kansas' divorce rates, lower the state's moral standard, and increase fraud.

Professor Higgins, who was commissioned to review the statute, responded to Judge Higgins's claim by explaining the statute change was not intended for this type of "shotgun" divorce. Professor Higgins contended, "It was of the opinion of the committee that a non-resident plaintiff in an action for divorce should be allowed to sue a resident defendant... It therefore happens that all of the suggested changes were not adopted and that this intention was not so clearly expressed as it would have been. However, I think the statute does reveal an intention to permit a non-resident plaintiff to sue wherever the defendant resides or may be summoned."¹⁰¹ Even though the commission did not intend for a loophole to occur, the wording of the new statute allowed non-residents to petition for divorce in Kansas.

Even though state divorce records were unavailable for these years, a preliminary examination of local data from Riley County showed a significant increase in divorces following the 1909 change in the statute. Before the statute was changed, the Riley County records showed the courts granted twenty-six divorces in 1908. Then in 1909, the number of divorces increased to thirty-two. The year 1910 saw divorces decrease to twenty-seven, but in the next two years, divorces significantly increased to thirty-eight in 1911 and 1912.¹⁰² Although the statute loophole is unlikely to be the only cause, if one examined county court records from counties on the Kansas border, one would expect to find a significant increase in divorces in these areas due to out-of-state couples using the loophole in the 1909 statute to their advantage.

During the 1912 Methodist Episcopal Church Kansas conference, the church found the recent increase in divorces across the state alarming. Through this conference the church called

¹⁰¹ *Ibid.*

¹⁰² Riley County Divorce Records 1908-1912. Riley County Genealogical Society.

its ministers and elders to review the church's position on divorce. The church forbade divorce except in cases of adultery. They also made it clear that ministers were not to marry someone who was divorced unless they were the innocent party to an adulterous spouse or if the divorced couple wanted to get remarried. The Methodist church also implored its members to petition members of Congress to coordinate and consolidate state divorce laws. The conference report explained, "We further urge upon our legislators and members of Congress the necessity of securing the co-ordination of the laws of the several states regulating marriage, divorce, wife and child desertion and other abuses of the marriage relation."¹⁰³ The church argued that states should have similar divorce laws. If the laws of Kansas were similar to her border states, then the 1909 statute loophole which allowed nonresidents to get a fast divorce would be eliminated, thus decreasing divorces in the state of Kansas.

Furthermore, the 1913 conference of the Methodist brethren reiterated its statement on divorce. The conference report stated, "'No divorce except adultery shall be regarded by the church as lawful; and no minister shall solemnize marriage in any case where there be a divorced husband or wife living, but this rule shall not be applied to the innocent party to a divorce for the cause of adultery, not to divorced parties seeking to be reunited in marriage.'"¹⁰⁴ It is interesting to note that following these pronouncements by the Methodist church in 1912 and 1913, divorces in Riley County decreased from thirty-eight in 1912 to twenty-six in 1913 and then to sixteen in 1914. How much the church's impact is reflected in these statutes is, of course, unknown.

What is clear is that the legal loophole created with the 1909 changes in the statutes allowed for an increase in divorces. That increase came at a time when growing numbers of

¹⁰³ Methodist Episcopal Church Kansas Conference Official Record and Minutes of the 57th Annual Session, 20-25 March 1912, Reforms Clause, 47.

¹⁰⁴ Methodist Episcopal Church Kansas Conference Official Record and Minutes of the 58th Annual Session, 5-10 March 1913, Reforms Clause, 47.

Kansans were concerned about the state's rising divorce rate. From 1899 to 1912, discussion in several state newspapers showed public concern about divorce in Kansas. In particular, Kansas district court judges were alarmed by this increase. They worried that people, especially women, were using the law to their own advantage. The majority of letters to the editor and articles advocated that the state legislature change divorce statutes because, they believed, it was too "easy" to get a divorce in Kansas. The discussion of divorces in Kansas led one newspaper, *Mail and Breeze* (Topeka), to seek the opinions of district court judges from around the state about the state of divorce law in Kansas. In a July 1899 article entitled "Too Easy to Obtain Divorce in Kansas," *Mail and Breeze's* survey of district court judges found divorces were rapidly increasing. The article contended, "it is too easy to obtain a divorce in Kansas, that a great many divorces are obtained through collusion and a one-sided hearing, that the marriage relation is too lightly regarded, and that the safety and best interests of the social state demand many important amendments to the existing divorce laws."¹⁰⁵ *Mail and Breeze* included eleven letters to their editor by district court judges that further argued that divorce law needed to be tightened in order to prevent the numbers of divorces they were seeing in their courtrooms.

After reading the judges' responses, it is clear that they were upset at the situation in Kansas. These judges believed that couples were not regarding the marriage union seriously. They claimed that couples were giving up on marriage too quickly. These Kansas district court judges made several convincing arguments for why there should be a change to these laws and then they presented several suggestions for change. First, the judges argued that the district attorneys should become the advocates for the marriage union in divorce proceedings. They also contended that collusion—that is, private cooperation between a husband and wife so as to more

¹⁰⁵ *Mail and Breeze* (Topeka), "Too Easy To Obtain Divorce in Kansas," 21 July 1899.

quickly get a divorce—needed to be stopped. Lastly, they argued divorce needed to be harder to obtain.

At the heart of the issue was the “dual” nature of marriage. On the one hand, the marriage contract was created by two individuals. On the other hand, once two individuals married, they had created a union with social significance that needed to be protected. It was the need to protect the social institution that required divorce petitioners to charge their spouses with a “crime” that had violated the union. In the Thirty-Fourth District, Judge C. W. Smith of Stockton argued that the county attorney needed to represent the state in every divorce case whether it was contested or not. He stated, “No civilization worthy the name can long endure without a high development of domestic virtues, nor where the marriage relation is lightly regarded. As we are one people no state should be permitted to treat this relation with less consideration than do all states.”¹⁰⁶ Smith argued that when a marriage was dissolved the whole community was affected, and he was particularly troubled that so many divorces were decided in *ex parte* hearings, that is, in a context where both parties were not present. In his view, the community should have an officer or representative who should, in effect, defend the marital union on behalf of the community. Furthermore, he maintained that instead of hiding the truth during a divorce proceeding, all information should be disclosed so that as few unjustified divorces would be granted as possible.

In his response to the editor of *Mail and Breeze*, Judge Smith provided several suggested changes to the state statutes. First, he believed each case should have a county attorney or another representative to defend the case in order to prevent divorces that were unjustified. Secondly, he requested that a waiting period be established so that no divorce case would be

¹⁰⁶*Ibid.*

tried within six months of the filing date. Third, in an acknowledgment of women's interests in the issue, Judge Smith argued that a jury of both men and women should decide divorce cases. He explained, "The jury should be given authority to decide whether or not the public interest requires that the guilty party should be prohibited from remarrying, and whether or not the guilty party should be prosecuted by the state as for an offense against its laws."¹⁰⁷ In previous years, divorces had been decided with little judicial deliberation which was why Smith sought a change to the system. He justified these reasons in his letter to the editor: "It is both a social and judicial outrage that a lawsuit involving so much both to the parties immediately concerned, their children and the public, can be tried and determined based on ex parte hearing before one man and in no more time that is required to perform the marriage ceremony."¹⁰⁸

Judge Smith understood that many people would see these changes as revolutionary, but he believed they were necessary in order to change the cycle of easy divorces in Kansas. He did not see a problem in funding the additional state costs for divorce proceedings because the costs would be offset by the safety and quality of society in the state. Smith did not foresee divorces becoming too hard to obtain. He concluded by appealing to widely held assumptions about the traditional virtues of home and family: "The glory and strength of our society rests in the purity and stability of its homes. If our homes are pure and unbroken no man will ever see the grave of this republic."¹⁰⁹ Judge Smith as well as others viewed the marriage union as an essential part of society which should not be dissolved lightly.

Another judge who took the issue of marriage and divorce quite seriously was Judge Z. T. Hazen of the Third District Court of Kansas of Topeka. He examined the last one hundred

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

divorce cases that he had tried in order to determine the trend in divorce in his district. He found ninety-one cases were disposed of by consent or upon default; thus, only nine cases were contested. Furthermore, he was satisfied through observation that the volume of divorce litigation was increasing. He also believed that a remedy could be found by mandating the involvement of the county attorney. Judge Hazen contended, “I believe a partial remedy for the evil would be found in the enactment of a law making it the duty of the county attorney to appear in all divorce cases, file an answer and make such defense as he deems proper. This would give him an opportunity to cross-examine the witnesses appearing for the plaintiff and would, I think, in many cases show thereby that the plaintiff is not entitled to a divorce.”¹¹⁰ With the current law in default cases, the district court judge could not enter into an extended cross-examination of the plaintiff’s witnesses, but the judge’s duty was to grant the divorce if the plaintiff made a convincing *prima facie* or self-evident case. In conclusion, Judge Hazen of Topeka recommended stricter procedural guidelines in order for judges to be able to decide the case with all sides of the information presented in order to make sure that a divorce was needed not just wanted by the plaintiff.¹¹¹

Judge Hutchinson of the Thirty-Second Kansas District Court recommended two changes to the present law. First, he also argued that county attorneys should be required to appear during the case to cross-examine witnesses and defend in all cases. Then he claimed the biggest problem with Kansas divorce law was the amount of collusion or secretive agreements in cases.¹¹² In his observations of Kansas divorce law, he found that it is decidedly unsatisfactory. He reasoned, “There are too many cases that are the result of collusion and are permitted to go

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² Judge Hutchinson lived in Garden City, Kansas.

by default. In a majority of them arrangements have been made before the commencement of the suit, by one or both of the parties to marry other parties, at the expiration of six months from the date of decree.”¹¹³ To counteract collusion, he argued that the divorce should not become absolute until five years from the date the case was decided instead of the current standard of a six-month waiting period to prevent fraud. Judge W. S. Glass of the Twenty-First District in Marysville agreed. He claimed, “There exists an almost universal opinion that the law will relieve from mistakes and sever the bonds of matrimony upon the slightest proof of statutory cause. The right to remarry, which is acquired at the end of six months, should, in certain cases, be withheld from and denied to both parties, and in other cases to the party at fault.”¹¹⁴ Judge Glass contended there were so many problems in the divorce statutes that he could not address them all at length, because of the word constraints of the newspaper. He insisted nevertheless that further changes needed to be made.

Judge O. L. Moore of Abilene agreed that divorces were too easy to get in Kansas but he tended to put the blame on himself and his judicial peers. He argued, “If courts were strict in requiring competent legal and satisfactory evidence in divorce cases as in other cases, there would be a less number of divorce suits instituted and a far less number of divorces granted.”¹¹⁵ In his opinion, the Kansas statutes for divorce were not the problem. The problem arose when the districts courts did not correctly implement the law. The rise in divorce cases on the docket in his opinion resulted “from the laxity of courts in granting divorces upon incompetent, if not wholly insufficient testimony.”¹¹⁶ By insisting that each case have satisfactory legal evidence, Justice Moore contended Kansas would see a reduction in the number of cases petitioned

¹¹³ *Mail and Breeze* (Topeka), “Too Easy To Obtain Divorce in Kansas,” 21 July 1899.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

especially, because he claimed nine out of every ten cases were in default and one-half of these cases were petitioned with express or implicit collusion. But Moore also acknowledged the compelling power of women's stories when he explained that most divorce cases involved a woman petitioner standing in court and telling the tale of her woes. No one objected to this type of testimony and without any other true evidence presented the judge must decide the divorce. If he decided that the case needed more legitimate evidence, he would face the likelihood that he would be deemed cruel by the community.

In this letter to the editor, Judge Moore argued that the courts did not need to change the law, only adhere to previously set precedents for establishing evidence and testimony in each case. He contended the court should maintain a minimal waiting period between the events of the case and the actual court hearing. Secondly, he believed that no grounds for divorce should be established without corroborated testimony by a party close to the suit. Next, he declared that evidence submitted would only be examined if the person giving the evidence was deemed clearly competent under the rules of the law. The evidence presented to sustain the alleged ground for divorce must be clear and conclusive. Furthermore, perhaps because he had heard so many women speak of abuse, Judge Moore argued proof that a couple's tempers were incompatible should not be regarded as evidence of extreme cruelty. Finally, Moore believed that any case in which collusion could be proved should be dismissed and the divorce denied. Moore argued judges around the state needed to implement these precedents for divorce cases, and by doing so Kansas district courts would see a decrease in cases on the docket.

The presiding justice of the thirtieth Kansas District Court in Minneapolis, Judge R. F. Thompson, chose to attack the liberal nature of Kansas divorce statutes, flatly asserting that divorces should be more difficult to obtain in Kansas. In his letter to the editor of the *Mail and*

Breeze dated July 18, 1899, Thompson offered a notably conservative view of divorce that rested almost entirely upon a defense of the marital union and its social value. Like many other leaders during the nineteenth century, Thompson believed the state of the nation's civilization and happiness depended upon the family; therefore, the state had a deeply vested interest in the stability and preservation of families. He elaborated, "I think it would aid very much in maintaining this institution if it was generally understood that the law requires the marriage contract, with few exceptions to continue indissoluble during the joint lives of the parties to it."¹¹⁷ In an effort to preserve the family, Judge Thompson believed that only one ground, adultery, was an acceptable reason for a divorce. He also deplored the spectrum of grounds for divorce in various states: "From that limited range to the unbounded discretion allowed the court by the statutes of Washington, each state, with one or two exceptions has provided more or less avenues of escape from the matrimonial condition, and in this line the legislature of Kansas, judging by comparison, has been very liberal."¹¹⁸ At the time of this letter, the state of Kansas enumerated ten grounds for divorce, and Thompson believed that the only way that divorce rates would decrease was to change Kansas statutes so that it was more difficult to "secure a judgment setting aside the marriage contract."¹¹⁹

All of these justices were troubled by the state of Kansas divorce though their reasoning varied. Some believed that divorce should be limited to cases of adultery only. Others believed divorce should only be allowed in cases of abuse, adultery, or abandonment. Still others asserted divorce law should be broad to allow people who want to get divorced for pretty much whatever reason to get divorced so long as someone in the court room spoke on behalf of the union. All of

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

these judges were upset about the perceived collusion in divorce suits, most particularly that women filed so many of divorce petitions to which men failed to respond. They deplored the fact that so many marriage unions seemed simply to be simply tossed away by many couples without cause. Most of all, these judges abhorred the fact that societal order was upset by these divorces. Women were stepping outside of the virtues of true womanhood and petitioning for divorce. The judges were upset that no one was stopping these women from forsaking their marriage vows. The marital union was in trouble with no one to help it survive. The opinions of these judges represent the varying public opinions about divorce at this time, except perhaps for one prominent, if unspoken, viewpoint: the opinion in favor of easier divorce that increasing numbers of Kansans took to the divorce courts.

The divide over divorce law was even expressed in two very different reactions to the same government report. The question was whether the Kansas divorce rate was high or whether it was low. One's perspective was clearly central in answering that question. In a November 28, 1909, article from the *Kansas City Journal* entitled "Ratio of Divorces is Remarkably Low," the author examined a recent study the Secretary of the State Board of Control, Fred W. Knapp. This study of the previous year's statistics revealed that the state had approximately one divorce for every eight marriages. In the past year there had been 17,107 marriages and the number of divorces was just over 2,000. After reading this article and especially from the article title, it was clear the author did not find the number of divorces to be a problem for the state.

However, an article reporting on the same study found this result to be cause for alarm. An article in the *Topeka Capitol*, also dated November 28, 1909, entitled "One-Eighth of Marriages are Failures," outlined the statistical information found in Mr. Knapp's report. Not only did this reporter examine the ratio of marriages to divorces, but he also examined the

grounds used to petition for a divorce. Between July 1, 1908, and July 1, 1909, there were 2,000 divorces granted in Kansas. Of these 2,000 divorces, 850 of them were granted on the grounds of abandonment. By comparing each of these article titles, it was clear that the same information could be examined and interpreted in different ways, but it was also clear that alarm was a more common response than indifference.¹²⁰

For example, an article published in the *Kansas City Star* on December 25, 1910, by Professor Ellwood of the Sociological Department at the University of Missouri landed on the side of alarm when he contended that if a change did not occur soon in divorce rates all marriages would be terminated by divorce instead of death. Professor Ellwood used statistics from Kansas City from the year 1910 in his investigation of divorce and marriage. He found the city issued 4,448 marriage licenses and the courts granted 722 divorces. There was one divorce for every six marriages in Kansas City that year. In the state of Missouri, there was one divorce for every eight marriages. One may think that the statistics for divorce in the rural areas would be significantly different from the city but Professor Ellwood determined this was not the case. The rural areas had just as many divorces.

Dr. Ellwood addressed the issue of rising divorce rates in the United States, ““For a long time the United States has led the world in the number of its divorces. Already in 1885 this country had more divorces than all the rest of the Christian civilized world put together.””¹²¹ Furthermore, Professor Ellwood explained the annual statistics of divorce in the United States showed approximately 68,000 divorces granted annually, while the rest of the Christian world only granted 40,000 divorces. Ellwood noted, “In France there is only one divorce to every

¹²⁰ *Kansas City Journal*, “Ratio of Divorces is Remarkably Low,” 28 November 1909.
Topeka Capitol, “One-Eighth of Marriages are Failures,” 28 November 1909.

¹²¹ *Kansas City Star*, “Computing the Divorce Census of Tomorrow,” 25 December 1910.

thirty marriages, in Germany one to every forty-four marriages, in England but one to every four hundred marriages. Even in Switzerland—which has the highest divorce rate of any country in Europe—there is only one divorce to every twenty-two marriages.”¹²² In the United States at that time, there was one divorce to every twelve marriages and in the states of Kansas and Missouri the rate was one divorce to every eight marriages.

In his study, Dr. Ellwood found the divorce rate of the United States increasing exponentially, especially in the states west of the Mississippi River. He contended the divorce rate was increasing more rapidly than the population. Ellwood maintained, “From 1867 to 1886 there were 328,716 divorces granted in the U. S., but from 1887 to 1906, the number reached 945,625, or almost a total of 1 million granted in twenty years. Again, from 1867 to 1886, divorces increased 157 percent, while the population increased only about 60 percent: from 1887 to 1906 divorces increased over 160 percent, while the population increased only slightly over 50 percent.”¹²³ Divorce in the United States was increasing at a rate of three times the population increase.

Dr. Ellwood speculated on what would happen if divorce rates continued at this high rate as well as what could end this rapid increase in the number of divorces. He contended that if divorce rates continued to increase, more marriages would be terminated by divorces than by death. From his research, Professor Ellwood found in 1870, 3.5% of marriages ended in divorce while in 1880, 4.8% of marriages were terminated by divorce. This percentage grew to 8% by 1900. Professor Ellwood estimated the future divorce rate increases:

If this increasing divorce rate continues, by 1950 one-fourth of all marriages in the United States will be terminated by divorce, and in 1990 one-half of the

¹²² *Ibid.*

¹²³ *Ibid.*

marriages. Thus, we are apparently within measureable distance of a time when, if present tendencies continue the family, as a permanent union between husband and wife, lasting until death, shall cease to be. At least, it is safe to say that in a population where one-half of all marriages will be terminated by divorce, the social conditions would be not better than those in the Rome of the decadence. We cannot imagine such a state of affairs without the existence alongside of it of widespread promiscuity, neglect of childhood and general social demoralization.¹²⁴

At this point in the article, the Professor stopped his commentary on the effects of increased divorce on society to explain how divorces are distributed among the various segments of the population.

Professor Ellwood examined the divorce statistics from different geographic areas as well as from different demographics. He found divorce was more common in cities than in the country areas and less common among the middle class. The professor was quick to point out that each of these statistical areas had exceptions. The census statistics showed that married couples with children were four times less likely to get divorced than couples without children. Ellwood explained, “This doubtless does not mean that domestic unhappiness is four times more common in families where there are no children than in families that have children, but it does show, nevertheless that the parental instinct is now, as in primitive times, a powerful force to bind husband and wife together.”¹²⁵

Next, Dr. Ellwood addressed the numbers of divorces by couples of different religious backgrounds. While the state census did not provide him with the data on the religious affiliations of divorced couples, data from Switzerland illustrated a divide between the numbers

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

of Protestant and Catholic couples who were granted divorces. The Switzerland study findings showed divorce was four times as common among Protestants than among Catholics. Additional observers noted divorces were most common among nonreligious couples, then among Protestants, next among Jews, and least common among Catholics. In agreement with this study, the Professor argued, “From this we might expect as our statistics indicate, that the divorce rate is much higher among the native whites in this country than it is among the foreign born, for many of the foreign born are Roman Catholics, and in any case, they come from countries where divorce is less common than in the United States.”¹²⁶

Additionally, Dr. Ellwood addressed the issue of blame in a divorced marriage. He contended, “For the last forty years two-thirds of all divorces have been granted on demand of the wife. This may indicate on the one hand, that the increase of divorces is a movement connected with the emancipation of woman, and on the other hand it may indicate that it is the husband who usually gives the ground for divorce.”¹²⁷ Even though he did not decide exactly if was the man’s fault or the result of an increase in woman’s emancipation, he did point to one ironic outcome of the women’s movement. Ellwood argued that one reason for the increase in divorces was changes in the standards of morality. He contended that immoral acts condoned fifty years before produced slight social effect, but the same acts in the early twentieth century had greater social consequences. One example of this was the standards a wife imposed on a husband. Dr. Ellwood elaborated, “For centuries, as we have already seen, the husband has secured divorce for infidelity of the wife, but for centuries no divorce was given to the wife for the infidelity of the husband, and this is even true today in modern England, unless the husband

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

be accompanied by other flagrant violations of morality.”¹²⁸ A wife who would have overlooked conduct by a husband fifty years ago now was filing for divorce on the grounds of the husband’s action.

At the same time, Dr. Ellwood argued that stricter moral standards led to increased divorce, he also saw that in some classes of society there was a decay of values, suggesting that the most basic virtues which needed to be present for the family to operate cohesively were not present. The virtues of family life included chastity but more important to Dr. Ellwood were the virtues of self-sacrifice, loyalty, obedience, and self-subordination. He found these virtues had been replaced with self-interest, self-direction, and self-assertiveness, in effect, the individualism of the modern age.¹²⁹

When asked to summarize the reasons he believed that divorce had increased, Ellwood seemed to emphasize factors that had changed the position of women. He found decay of religion within the family and marriage to be the primary reason for divorce. Secondly, the growing spirit of individualism including the characteristics of self-assertion and self-interest led “man to find his law in his own wishes or even in his whims and caprices.”¹³⁰ He further explained how individualism among women had spread within the last fifty years as a result of the women’s rights movement. Third, the growth of modern industry was a factor in the increase of divorces. The growth of industry opened many new opportunities for both men and women which led them away from family relations. Dr. Ellwood’s final reason for an increase in divorce was the laxity of divorce laws.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

Instead of turning back the tide of modern life, Ellwood centered his solution on changing the law. He protested the “laxness” of divorce explaining that the increasing laxity in administration of these laws and the court system contributed to an increase of divorces. He explained the reasons behind these changes, “All divorce courts have two excuses for their laxity in the overwhelming number of cases before them and the fact that public opinion favors laxity.”¹³¹ With the combination of these changes in the laws and the way that the courts administer the laws, it was clear why divorces were increasing. Dr. Ellwood argued that if changes were not made to divorce law and in the opinions of society, the divorce rate would continue to increase until it reached fifty percent by the late twentieth century. Dr. Ellwood’s predictions were valid. Dr. Ellwood concluded his statements by arguing that the instability of the family was the greatest social problem of the day. He presented several ways that this social problem could be corrected through stricter divorce laws, comprehensive federal laws instead of state laws, and more emphasis on education.

A November 21, 1911, article in the *Topeka Capital*, found that rates of divorce in Topeka were one divorce to every three marriages. This was a significantly high number of divorces. Dr. Ellwood’s statistics from late 1910 showed that Kansas City had a divorce rate of one divorce to every six marriages. The article in the *Topeka Capital* argued for uniform laws that were stricter than the present laws. In 1910, Topeka’s divorce rate was one divorce for every five marriages, but by 1911, their divorce rate had increased to every third marriage ending in divorce. Women filed a majority of the divorces filed in Topeka in 1911. Of the 233 divorces filed, women filed 196 or 84% of these divorces. In order to understand this increase in divorces

¹³¹ *Ibid.*

in Kansas, the reporter of this article interviewed judges of the district courts and a prominent attorney.

These prominent men of the community offered several suggestions that echoed the comments of the district court justices interviewed in the 1899 *Mail and Breeze* survey. Judge A. W. Dana of the First District Court explained that he would limit the grounds for divorce and further define the vague grounds of “extreme cruelty” and “gross neglect of duty.” He further suggested that uniform divorce laws should be adopted and a public investigator should investigate all claims, producing witnesses to uphold his findings. Judge George H. Whitcomb of the Second District Court argued that the time restrictions should be extended for a person to remarry following the court’s granting of a divorce. He wanted to extend the waiting period from six months up to two or three years. Secondly, he requested a public investigator or county attorney appear in cases where the defendants could not appear for themselves.

Attorney Robert Stone advocated uniform nationwide laws. He explained that the American Bar Association had appointed a committee to draft uniform divorce laws. He contended that Kansas should adopt these uniform laws as well as limit the number of grounds for divorce. Stone elaborated his position, ““Extreme cruelty, and by that I mean physical abuse, and faithlessness should be about the only grounds. There is a tendency under present procedure for plaintiffs to distort and exaggerate the facts. One side comes in and the other does not. It ought to be the duty of the probation officer or county attorney to frame the issues and appear for the defendants.””¹³² Each of these men believed that there should be a significant change in the law in order to decrease the number of divorces in Kansas. Finally, many of the district court judges stated that fraud and collusion had become a problem in divorce cases.

¹³² *Ibid.*

Many of the concerns expressed by these district judges in 1899 were vividly on display in an unusual pair of divorce cases in Clay County during the late 1890s: what made the cases particularly memorable was that they involved the same woman. Susanna Angeline Simpson was born in Indiana in July of 1847.¹³³ At some point, her family evidently moved to Kansas, because in 1865 she married Henry Sanders in Clay County. Henry Sanders and his brothers had been born in county Sussex, England, and emigrated to Kansas as teenagers where they became some of the first residents of Clay County, a fact that Henry Sanders' obituary emphasized:

Mr. Sanders and his brothers were among the real old-timers in Clay County, having come here from their pioneer home in Riley County before Clay Center was a town at all. Their first shelter here was a 'place dug in the sod and covered with grasses and branches of trees for protection.'¹³⁴

The Sanders' brothers eventually set up homesteads in the Broughton area where they built three longstanding stone houses. Before marrying Susanna, Henry enlisted in the Union army at Ft. Riley in 1862 and served three years with Company I. Henry and Susanna had seven children together before Henry, after over a quarter century of marriage, left Kansas in 1893 with the couple's oldest son and moved to Gales Point, Florida, where he took a job as a locomotive engineer. Susanna was left in Clay County with four minor children still living at home.¹³⁵ On April 9, 1896, Susanna A. Sanders filed a divorce suit against Henry Sanders. Given his whereabouts, she picked as grounds the most common one, that of "abandonment."¹³⁶

Divorce suits are not the most reliable source for determining what was actually occurring within a marriage. As Susanna demonstrated on two separate occasions, the law

¹³³ Manuscript Census of the United States, 1900.

¹³⁴ *The Economist*, "Henry Sanders Dead," 25 April 1934, 6. Interesting note: At the age of 11, Mr. Sanders attended the first World's Fair in the Crystal Palace in London and at the age of 92 years he attended the 1933 Chicago World's Fair.

¹³⁵ *Ibid.*

¹³⁶ *Sanders v Sanders*, Clay County District Court, State of Kansas.

required any divorce plaintiff to state their rationale within the well-worn tracks that the law provided. It is possible that Henry Sanders had simply abandoned his wife; certainly in the 19th century, the most direct way to dissolve a marriage, particularly for men, was simply to leave. It was also possible, however, that Henry Sanders had moved to Florida looking for better opportunities and had left thinking that he was moving ahead of his family and planned for them to follow him later: perhaps Susanna had balked at the idea. Or, it may have been that, as so many district judges suspected, the two parties had grown weary of each other, and had in fact colluded to obtain the divorce with the least amount of fuss. Whatever the case, Susanna's divorce petition notes that her husband had in 1896 been living in Florida for more than five years (a number that does not correspond to her own claim that Henry had moved in 1893). More importantly, Susanna also claimed that Henry had accumulated significant property in Florida, which she estimated at a value of more than \$5,000.

It was clear that property was Susanna Sanders' primary concern, and her petition seems to depict a woman well aware of the Kansas provisions for married women's property rights. Her petition claimed that, at the time of the couple's marriage, she had brought more financial stability to the marriage than did her husband, specifically "that at the time of the marriage of plaintiff [Susanna] and defendant [Henry], plaintiff was the owner of one horse, two cows, five sheep, some money and other personal property, all of the value of \$500. That at that time said defendant was the owner of a small amount of property only worth much less than the value of plaintiff's property at that time."¹³⁷ Acknowledging that she and her husband had grown their farm together, Susanna argued the couple used her property jointly, and that therefore, she should get her property back along with a part or all of the property they accumulated together.

¹³⁷ *Ibid.*

Therefore, Susanna asked the judge for a divorce from Henry Sanders, the return of her own real estate and property, possession of the couple's homestead, freedom from any debts accrued by her husband, and custody of the children.

It appears that Henry Sanders either did not respond or at least did not contest the divorce suit. In the Court's findings, the judge ruled that the evidence established the defendant had abandoned the plaintiff for more than one year; therefore, the divorce was granted. However, the judge still had to decide the issues of child custody and property ownership. Susanna Sanders received custody for the care and education of Samuel Sanders, minor, the couple's youngest child who was around five at the time of the divorce¹³⁸. The Court awarded Henry Sanders custody, care, and education of Rosa Bessie Sanders, minor.¹³⁹ In deciding the property issue, the Court awarded Susanna all real estate in her name as well as the sum of \$650 from the defendant to pay for fees, bills, past due maintenance, and future support for their minor child, Samuel. Furthermore, the Court declared that Susanna Sanders would retain possession and ownership of the homestead farm.

Had this been the end of her sojourn in the courts, Susanna Sanders would perhaps be remembered as a woman who had prevailed in difficult circumstances. But in very short order, she embarked on a course that one supposes would have raised eyebrows in Clay County. Six months after her divorce, at the first moment that it was legal for her to do so, Susanna Sanders remarried. More shockingly, the man she married on Christmas Day 1896 was William W.Y. Downing, a man twenty-six years her junior: she was forty-nine, he was twenty-three.

Barely more than two years later, on January 9, 1899, the matrimonial saga took a turn guaranteed to incite community gossip: Susanna A. Downing petitioned the Clay County

¹³⁸ The Census manuscript of 1890 shows Susanna Sanders living with a nine-year-old son.

¹³⁹ *Sanders v Sanders*, Clay County District Court, State of Kansas.

District Court for a divorce. This time, Susanna as plaintiff cited the serious charge of “extreme cruelty” as grounds. In the itemization of abuse that followed, the savvy woman who protected her property in her 1896 divorce suit had disappeared and had been replaced by a woman victimized by a brutal husband. Her suit maintained that about eighteen months after they had been married, she and her husband were working together at the butcher shop that she owned in Clay Center. She then asserted that

Said defendant became enraged at this plaintiff without cause or provocation and struck plaintiff with his fists, viciously and violently upon the face and head thereby inflicting injuries upon this plaintiff which caused plaintiff great physical suffering as well as intense mental and nervous distress and humiliation by reason of such conduct on the part of her said husband.¹⁴⁰

Susanna Downing further claimed that following the incident in the butcher shop, her husband had struck and beat her on frequent occasions, almost daily, and had also threatened to kill her. Specifically, she maintained that, only six weeks before, in November of 1898, while she was in her residence suffering from an illness, her husband had attacked once again, and had “. . . without cause or provocations struck plaintiff several times with his fists upon the face and head, thereby injuring plaintiff so that she suffered intense physical pain for many days and from the effects of said injury said plaintiff has not at this time wholly recovered.”¹⁴¹ Furthermore, she claimed, less than a month before her petition, William Downing had threatened to beat her with a heavy stove poker, and with his fists. The physical abuse, she added, was accompanied by a constant stream of “vile, abusive, indecent, and profane language” directed toward her constantly. Moreover, her husband had also been guilty of “infidelity.”

¹⁴⁰ *Downing v Downing*, Clay Center District Court, Case No. 4549, State of Kansas. (Petition)

¹⁴¹ *Ibid.*

Susanna Downing's list of abuses was not, however, complete. Her petition went on to claim that William Downing had also abused her son Samuel. Her young child had begged his stepfather not to abuse his mother, an attempt at intervention that had cost him dearly, for William Downing, she charged, "has many times severely whipped and beaten the said child and to such an extent as to endanger the life of said child."¹⁴² Additionally, Susanna made clear that, in submitting her divorce petition, she was risking her life: William, she claimed, had repeatedly made threats that if she filed for divorce, he would "shoot her house full of holes and burn her out."¹⁴³ Her summary of her situation was an indictment of the character of her husband, who was she said,

. . . a man of violent and vicious temper . . . [who] exercises no control over his temper and plaintiff alleges that she is constant fear of her life by reason of such conduct and threats upon the part of said defendant. Plaintiff said further that for more than six months past she has lived and now lives in constant fear of an assault and beating by said defendant."¹⁴⁴

A day after filing a petition for divorce, Susanna A. Downing completed the picture of herself as a terrified battered wife by petitioning the district judge for a restraining order against her husband. The restraining order was to prevent her husband from residing in the same residence during the pending legal action. She also asked that her husband be restrained from interfering in any manner with her property or possessions. The judge granted her request.

The nightmare marriage depicted in Susanna Downing's divorce petition as well as her request for a restraining order was, of course, the reality for far too many women in the United States. Indeed, one of the strongest arguments for liberalized divorce laws was the assertion that

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

only the right to divorce would insure that abused women were not forever trapped in such brutality. For any particular case, however, the question must necessarily be asked: did a divorce petition of this type reveal a horrible and vicious truth, or did it merely reveal a woman who knew what language must necessarily be used to leave an inconvenient marriage? Clearly, the district judges who were polled the same year that Susanna Downing filed this petition were suspicious that, at least at times, it was the latter that guided the plaintiff's actions. Certainly in the Downing case, some of the action that ensued raised those very questions about Susanna.

There was, for example, the fact that the Court records for this case included a letter from Susanna's attorney, dated February 2, 1899, to the sheriff of Wyandotte County. The attorney offered the sheriff compensation to serve a summons for Mr. Downing to return to Clay County for the case. The problem was that the sheriff would have to find him first: the attorney provided a physical description of William Downing, his last known address, and the information that Downing was believed to be in Kansas City working a meat packing plant.¹⁴⁵ If Downing was no longer in Clay County, why had Susanna Downing filed for a restraining order in early January? And did it mean anything that this allegedly terrorized woman had specifically asked that Downing be required to leave her property alone?

William Downing was obviously found because he responded to the divorce petition in late February. Not surprisingly, he denied all of her claims of abuse. But his response went on to make a startling accusation: his wife, he claimed, had lured him into marriage under false pretenses and, since the beginning of the marriage, had treated him with contempt. In short, William Downing turned the tables. There was an abused party, but his claim was that it was himself.

¹⁴⁵ *Downing v Downing*, Clay Center District Court, Case No. 4549, State of Kansas (Letter from Prosecuting Attorney Williams to the Sheriff of Wyandotte County, Kansas).

William Downing's response, not surprisingly, begins with the assertion of his own respectability. He had been, he said, a well-known and respected member of the Clay Center community since his birth. After a failed first marriage and a spell of "discouraged loneliness," he had been drawn to the older woman because she was "strong and vigorous." He even claimed that he saw her failed marriage as something of an asset: given her long experience as a wife, he believed that she would be fully committed to their union. But the rest of Downing's story tended to undercut any sense of a marriage between two grown adults separated by age but united by mature commitment. Instead, he chose to portray himself as an innocent seduced by a conniving older woman and, in the process, revealed himself as either a hopelessly naïve young man, or a cynical gold digger, or both. His account of the beginning of their relationship is significant:

When in the month of July 1896 after urgent solicitations and of repeated invitations from said plaintiff he took up his residence at plaintiff's residence. He was flattered ...by plaintiff and made to believe that his virtues and attainments physical and social were such that plaintiff would gladly support him without expenditure of the toil so frequently the lot of man. In this way plaintiff obtained an influence and command over defendant that made him virtually her slave.¹⁴⁶

Susanna's divorce from her first husband had been granted only a month before; it would not be final (and Susanna free to remarry) until December of 1896. It appears that, during this six-month period, Downing began to suspect that he would not enjoy a life free of toil after all. Instead of a position as a sort of gentleman farmer, he found himself treated more like a hired man. Tired of the chores and odd jobs that Susanna assigned him, he evidently grew restless with the arrangement. At that point, he claimed, Susanna enticed him with a new prospect:

¹⁴⁶ *Downing v Downing*, Clay Center District Court, Case No. 4549, State of Kansas (Answer by Defendant).

using her capital (plus a \$70 contribution that Downing had obtained from his father), she opened a butcher shop in Clay Center. For a year – that is, both before and after their December 1896 wedding – Downing “slaughtered the cattle, carried the carcasses, cut the beef, bought the beeves and kept shop in order while plaintiff took charge at the close of each day of cash proceeds of the business and financed the venture generally.”¹⁴⁷ In his countersuit, Downing also revealed a rather bizarre arrangement, given that they were officially husband and wife: Susanna paid him \$25 per month for his efforts in the butcher shop and provided “board and lodging.” When the butcher shop closed, Downing then went back to work on the farm, in order, he said, “to improve the plaintiff’s property.”¹⁴⁸

Indeed, perhaps the most striking aspect of Downing’s countersuit was his consciousness of the vast differences in the property owned by his wife versus his own economic standing. He noted, for example, that he had taken a job working as a section hand for the Rock Island Railroad in 1898, and had contributed all of his wages from this period of time, \$154, to the family treasury. He was concerned that his financial contributions had allowed his wife to purchase hogs, valued at \$60, that she now owned. He complained that his wife had kept several pieces of furniture that he acquired before the marriage that he valued at \$50. In contrast to his own poor standing, Downing noted that his wife owned the property where the family resided, valued at \$1500, and also possessed a mortgage on three houses in Broughton valued at \$3000, as well as horses, cows, farm implements, and other personal property valued at \$500. All that he had was, literally, the clothes on his back: he had been “correct in his habits, economical in expenditures and zealous in his efforts to promote the financial interests of said plaintiff and now

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

has not property (other than a single suit of wearing apparel) which is not in the possession of said plaintiff.”¹⁴⁹

In a later affidavit, Downing categorically denied that he had ever physically abused his wife and told a story that tended to undercut Susanna’s claim that she was terrified of him. When the Wyandotte County sheriff had found him in early February, Downing had returned home immediately. When he showed up, Susanna had shown him the restraining order, but had then allowed him to stay at the residence. Downing claimed that he immediately set to work taking care of farm business. He went so far as to account for the \$9.00 that had been in his possession when he returned: all but \$1.50, he claimed, had gone for groceries for his wife. Downing’s story was reinforced by an affidavit from the Downings’ hired man, C. P. Ellis. Ellis testified that William Downing had been “careful” of the interests of Susanna Downing in taking care of the farm and livestock, including during the period since his return. More significantly, Ellis also claimed that he had never seen anything to believe that the plaintiff was in any danger of bodily harm from her husband, asserting instead that Downing had conducted himself at all times as an ordinarily reasonable and kind husband.¹⁵⁰

As for his Downing’s alleged infidelity, he more or less confessed. But he added that the fault for his behavior rested on Susanna Downing. He had been induced to such acts

by the vile, profane, indecent and abusive language and villainous threats of said plaintiff heaped on this defendant day after day that said plaintiff with vile, profane invective too indecent to be written has frequently threatened to murder this defendant and instead of seeking the “legitimate ends and objects of matrimony” has made defendants fond dream of wedded bliss a reign of terror.¹⁵¹

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

Downing therefore asked for divorce on the same grounds that Susanna had claimed: extreme cruelty. And he also asked that she be required to pay him the sum of \$584 plus his furniture and whatever else the Court could provide for “equitable relief.”

Susanna Downing denied William Downing’s claims, and it appeared that the case was headed for a lengthy series of legal claims and counter-claims. But then William Downing withdrew his entire petition, and as quickly as it had begun, it was over. On March 23, 1899, the Clay County district judge granted the divorce on the grounds that Susanna Downing had originally claimed: “The Court further finds upon the evidence adduced that said defendant has been guilty of extreme cruelty toward said plaintiff as claimed in her said petition and that because of said acts of extreme cruelty, said plaintiff is entitled to be divorced from said defendant on account of the fault of said defendant.”¹⁵²

But in a twist, the judge also noted a rather surprising property settlement. William Downing would be paid \$100, considerably smaller than the \$584 he had asked for, but Susanna Downing, now once again Susanna Sanders, would be responsible for all family debts. In addition, in one of those dreary lists that tend to accompany divorce decrees, the judge enumerated the property to which William was entitled: three hogs, one cherry bedroom set, one spring, mattress, bedding, one stove and pipe, ten chairs, three window blinds and fixtures, one poker table, one rocking chair, one hammer, two saws, one water bucket, two spittoons, and one wash set. What had happened? It appears that William and Susanna Downing were probably guilty of the collusion that district judges worried about. In all likelihood, William had agreed to drop his counter suit in exchange for a reasonable property settlement.

¹⁵² *Downing v Downing*, Clay Center District Court, Case No. 4549, State of Kansas (District Court Journal Entry March 24, 1899).

The records of the Downing divorce tend to underscore the inadequacy of such records when it comes to determining the “truth” of a failed marriage. Indeed, such a determination is ultimately impossible. Was Susanna Downing a foolish woman flattered into marriage by a younger man only to find out that he was a brute? Or, was William Downing a gullible young man seduced into servitude by dreams of being a country squire living off of his wife’s property? Or did both versions carry part of the truth? Is it possible that William Downing, weary of the labor from which he had thought his marriage would free him, turned his rage on his wife and her child?

Whatever the case, Susanna Simpson Sanders Downing had once again used the liberal divorce laws of the state of Kansas to free herself and preserve her property. It does appear however that her reputation in the community did not survive the second divorce. When she died in 1909, her obituary was short with plain language suggesting that the community never accepted her actions. William Downing seems to have landed on his feet. In the census manuscript of 1910, he is listed as married to a woman named Rose, his occupation that of “butcher.”

The divorce cases of Mrs. Holtzgang, Mrs. Selts, and Mrs. Sanders are unusual when examining at divorce cases of Kansas women. Each of these women had property that they were willing to go to the courts to protect. Mrs. Holtzgang and Mrs. Selts continued to maintain successful businesses. One could assume from a careful scrutiny of their obituaries that the community accepted their divorces. The community found that their former husbands were in the wrong and these women overcame the stigma of divorce. In contrast, Mrs. Sanders’s obituary was short and lacked the flowery language of the other two obituaries. The community did not respect her actions. The way that she handled her second divorce as well as the

possibility that one of her sons from her first marriage was illegitimate leads one to believe that the community judged her actions unfavorably. This case provided an example of a case in which the community did not rally around the woman. Even though these cases are different they are similarly unusual because the women came out of the divorce with property.

The usual situation of women petitioning for divorce were women who were desperate to get out of their marriage. After a careful examination of divorces in Clay and Riley County, Kansas, one can see that the majority of the cases did not deal with women seeking a property settlement, but the women were simply trying to escape from a troublesome marriage. In Clay County in 1883, the Court heard sixteen divorce cases. Of these sixteen cases, women petitioned the Court in fifteen of them. The primary reason listed for these divorces was abandonment with seven of the cases listing that as the grounds for the case. Three of the cases outlined habitual drunkenness as the grounds and two of the cases used extreme cruelty as the motivation for filing. In the one case in which the husband petitioned, he did so under the grounds of abandonment. These cases illustrate that most women were desperately looking to escape their marriage and it seems reasonable to assume that most did not do so for the reason of securing their property. When in a troublesome situation, women used the courts if possible to provide legal relief from the marriage.

But, whether judges liked it or not, men and women seeking to end troublesome marriages could use the divorce laws of Kansas to their own purposes. In addition, as the three cases in Clay County illustrate, the divorce laws combined with Kansas' liberal provisions for married women's property rights could be used advantageously by women who owned property. District judges, statisticians, and the public itself could wring their hands over the seeming

fragility of the social institution of marriage: for at least some women, the larger issue was that Kansas had institutionalized the possibility of their own individualism.

Conclusion

Ida Marion Selts, Bertha Holtzgang, and Susanna Sanders Downing were three women who were able to use the liberal divorce laws of Kansas to achieve something of a “victory” out of their divorces. But we must not suppose that such women represented the majority of cases. Judges might complain of women who stood in their courts and told “tales of woe,” but for many women, frequently the ones who were the poorest, those tales were all too real. Indeed, the record at times illuminates, not the possibilities of divorce, but rather all-too-common tragedy for women who lacked the resources to escape from brutality.

An extreme case in Riley County, Kansas, demonstrates this reality all too clearly. In the early 1920s, Clara Lee was married to J. M. Lee who was, by everyone’s account, a drunk. Mr. Lee, whom the newspaper openly described as “worthless,” habitually threatened and beat his wife. The police had arrested Mr. Lee on several occasions for drunkenness: indeed his severe addiction to alcohol had led him to the consumption of “Force,” a medicine, or lemon extract, or any other intoxicant he could get his hands on. Neighbors contended that Mr. Lee would steal canned fruit and other goods that had been bought for the home and return them the store in exchange for lemon extract. Mr. Lee’s neighbors told the newspaper that he had once sold a bag of chicken feed in order to use the money to pay for liquor. Due to her husband’s habitual drunkenness, Clara Lee was the sole support of her family which included two young sons. Mrs. Lee brought in money by doing laundry; in order to make ends meet she would do as many as 25 to 30 washings per week. Clearly, her actions made it difficult for Mrs. Lee to support their family when he used the money that she earned from washing to buy alcohol, and his physical

abuse made her life an ongoing nightmare. The police knew of Mr. Lee's problem and had arrested him four times in the months prior to the family's final "incident."¹⁵³

The *Manhattan Daily Nationalist* ran a sad story on February 26, 1923, explaining the horrific conclusion to the Lee marriage. A few weeks before, Clara Lee had decided that she could no longer live with the threats and beatings and so she took legal action by filing for divorce. The divorce petition angered Mr. Lee and his abuse and threats had escalated. When she requested a restraining order, the court stepped in and ordered Mr. Lee to keep away from his home. After it had been determined that Mr. Lee had no money for other lodging, the court allowed him to stay on the couple's property but he was not allowed inside the house. A sympathetic judge might have believed that he was forging the only compromise possible: so long as they were married, her home was his home as well. J.M. Lee had an undeniable right to be there. Neighbors testified that he stayed away from the house in a pitched tent in the yard, but that he would "talk" to his wife from outside.¹⁵⁴

When the police arrived at the property on August 23, they found Mrs. Lee unconscious. J. M. Lee had beaten his wife with a club, knocking her down, and beating her over the head until she was unconscious. A doctor was called and he determined that the wounds were very serious and she was taken to the hospital. Unfortunately, Clara Lee died from the injuries she suffered during the attack. The *Manhattan Daily Nationalist* described Mrs. Lee as "a small, frail, overworked, nervous woman who feared her husband, and was kept in a state of subjection and fear by the threats of her husband."¹⁵⁵ She was right to be afraid of her husband. Although she used the court system to begin the legal process to terminate her marriage, the distance

¹⁵³ *Manhattan Daily Nationalist*, 26 February 1923.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

between the promise of the law and the actual escape was too far, particularly for a woman with virtually no economic resources.

While not all Kansas women experienced the level of violence that Mrs. Lee had, the divorce statistics of the era suggest that her story was more typical of Kansas women than that of the three propertied women in Clay Center. When over two-thirds of the Kansas women who filed for divorce listed abandonment or extreme cruelty as grounds, then we know that behind many of those petitions, there must be a story with only the slightest chance of a happy ending. Unlike Selts and Holtzgang, for many discarded wives, the word “abandonment” meant absolute destitution. Unlike Sanders Downing, but for many women like Clara Lee, the words “extreme cruelty” meant, unambiguously, a story of terror.

And yet even a story as extreme as Clara Lee’s points to the meaning of Kansas’ more liberal provisions for women who sought to escape the bonds of marriage. Even in her situation, Lee understood that she had a right to be free of her abuser. And even a woman as poor as Clara Lee, had she succeeded, had a property stake in the outcome: once free of an abusive husband who stole food from his family’s table, the pittance that she earned from doing laundry would at least belong to her and her alone, and she could use it to meet the needs of her children. Unfortunately, the law could not react fast enough for her nor could it act as a bodyguard. But in a world in which the remnants of coverture still existed and a woman’s rights as an individual were only partially recognized, Kansas women were no longer inescapably tied to horrible marriages. They could, and frequently did, use the court system to find a remedy for their personal situations. Prior to this study, the changes in Kansas divorce law were virtually unknown. Clearly, divorce law in Kansas played a major role in women’s lives. As a state, the Kansas Constitution led the way in the mid-nineteenth century for states to begin giving more

rights to women. However, as the complaints of the Kansas district courts judges showed, men were not always comfortable with these changes. They found the disruption of society and the lack of care for the marriage union to be disconcerting. But for the women of Clay and Riley County, Kansas, the ability to petition for divorce opened options for them to own property and to remove themselves from harmful marital situations. Kansas women knew the law and they could use it for their own purposes.

Bibliography

Primary Sources

Books

Bishop, Joel. *Commentaries on the Law of Marriage and Divorce*. Boston: Little, Brown, & Co., 1881. Pdf p 534

Cahen, Alfred. *Statistical Analysis of American Divorce*. New York: Columbia University Press, 1932.

Clay Center Register of Marriages. Clay Center, KS Courthouse.

Gordon, Ann D., ed. *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony, Vol. I, In the School of Anti-Slavery 1840-1866*. New Brunswick, New Jersey: Rutgers University Press, 1997.

_____. *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony, Vol. II, Against An Aristocracy of Sex, 1866-1873*. New Brunswick, New Jersey: Rutgers University Press, 1997.

_____. *The Selected Papers of Elizabeth Cady Stanton and Susan B. Anthony, Vol. IV, When Clowns Make Laws for Queens, 1880-1887*. New Brunswick, New Jersey: Rutgers University Press, 1997.

Howard, George Elliot. *History of Matrimonial Institutions*. Chicago: University of Chicago Press, 1904.

Lichtenberger, J.P. *Divorce: A Social Interpretation*. New York: Whittlesey House, 1931.

Manuscript Census of the United States, 1900.

Manuscript Census of the United States, 1910.

Methodist Episcopal Church Kansas Conference Official Record and Minutes of the 57th Annual Session, 20-25 March 1912.

Methodist Episcopal Church Kansas Conference Official Record and Minutes of the 58th Annual Session, 5-10 March 1913.

Springer, Marlene and Haskell Springer, eds. *Plains Woman: The Diary of Martha Farnsworth, 1882-1922*. Bloomington: Indiana University Press, 1986.

Wright, Carroll. *A Report on Marriage and Divorce in the United States, 1867-1906*, Parts I-II, Washington D.C.: U.S. Government Printing Office, 1908-1909.

Articles

Clay Center Dispatch, "Pioneer Business Woman," 18 May 1906.

Lichtenberger, James. "Divorce: A Study in Social Causation," *Studies in History, Economics, and Public Law*, v. 35, n. 3 1891, 5-225.

Manhattan Daily Nationalist, "Kills Wife: J.M. Lee in Act Frenzy Beat His Wife Unmercifully, Causing Her Death This Afternoon," 26 February 1923.

The Economist, "Henry Sanders Dead," 25 April 1934.

The Times, "Ben Selts Dead," 22 October 1903.

The Times, "Bertha Holtzgang Johnston," 30 November 1933.

The Times, "Holtzgang," 1 July 1909.

The Times, "It is Historical," 6 April 1905.

The Times, "Tribute From Her Friends," 5 December 1907.

The Times, 24 August 1911.

Wichita Daily Eagle, "Mr. Lease is Forgiving," 25 May 1902, Mary Elizabeth Lease folder, Kansas State Historical Society, Topeka, Kansas.

Legal Cases

Downing v Downing, Clay County District Court, Case No. 4549, State of Kansas.

Holtzgang v Holtzgang, Clay County District Court, Case No. 4113, State of Kansas.

Sanders v Sanders, Clay County District Court. State of Kansas.

Selts v Selts, Clay County District Court, Case No. 4386, State of Kansas.

Secondary Sources

Books

Bardaglio, Peter W. *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*. Chapel Hill: University of North Carolina Press, 1995.

Basch, Norma. *Framing American Divorce: From the Revolutionary Generation to the Victorians*. Berkeley: University of California Press, 1999.

Blake, Nelson. *The Road to Reno: A History of Divorce in the United States*. New York: The Macmillan Company, 1962.

Chused, Richard H. *Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law*. Philadelphia: University of Pennsylvania Press, 1994.

Cott, Nancy. *Public Vows: A History of Marriage and the Nation*. Cambridge, Mass.: Harvard University Press, 2002.

_____, ed. *Roots of Bitterness: Documents of the Social History of American Women*. Boston: Northeastern University Press, 1986.

Degler, Carl. *At Odds: Women and the Family in America from the Revolution to the Present*. New York: Oxford University Press, 1980.

DiFonzo, J. Herbie. *Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth-Century America*. Charlottesville: University Press of Chicago, 1997.

Edwards, Rebecca. *New Spirits: Americans in the Gilded Age 1865-1905*. New York: Oxford University Press, 2006.

Eickhoff, Diane. *Revolutionary Heart: The Life of Clarina Nichols and the Pioneering Crusade for Woman's Rights*. Kansas City: Quindaro Press, 2006.

Fenton, William B. *District Courts in Kansas*. Lawrence: University of Kansas Publications Governmental Research Series No. 28, 1964.

Fink, Deborah. *Agrarian Women: Wives and Mothers in Rural Nebraska, 1880-1940*. Chapel Hill: University of North Carolina Press, 1992.

Goldberg, Michael Lewis. *An Army of Women: Gender and Politics in Gilded Age Kansas*. Baltimore: The Johns Hopkins University Press, 1997.

Goode, William J. *Women in Divorce*. New York: The Free Press, 1956.

- Griswold, Robert. *Family and Divorce in California, 1850-1890*. Albany: State University of New York Press, 1982.
- Grossberg, Michael. *Governing the Hearth: Law and the Family in Nineteenth Century America*. Chapel Hill: University of North Carolina Press, 1985.
- Halem, Lynne. *Divorce Reform: Changing Legal and Social Perspectives*. New York: The Free Press, 1980.
- _____. *Separated and Divorced Women*. Westport, Conn.: Greenwood Press, 1982.
- Hartog, Hendrik. *Man and Wife In America: A History*. Cambridge: Harvard University Press, 2000.
- Hoff, Joan. *Law, Gender, and Injustice: A Legal History of U.S. Women*. New York: New York University Press, 1991.
- Jacob, Herbert. *The Silent Revolution: The Transformation of Divorce Law in the United States*. Chicago: University of Chicago Press, 1988.
- Jacobson, Paul. *American Marriage and Divorce*. New York: Rinehart & Co., 1959.
- Jones, Mary Somerville. *An Historical Geography of the Changing Divorce Law in the United States*. New York: Garland Publishing, Inc., 1987.
- Kerber, Linda. *Women of the Republic*. Chapel Hill: University of North Carolina Press, 1980.
- Konig, David Thomas. *Devising Liberty: Preserving and Creating Freedom in the New American Republic*. Stanford: Stanford University Press, 1995.
- May, Elaine Tyler. *Great Expectations: Marriage and Divorce in Post Victorian America*. Chicago: University of Chicago Press, 1980.
- Mintz, Steven and Susan Kellogg. *Domestic Revolutions: A Social History of American Family Life*. New York: The Free Press, 1988.
- O'Neill, William. *Divorce in the Progressive Era*. New Haven: Yale University Press, 1967.
- Pascoe, Peggy. *Relations of Rescue: The Search for Female Moral Authority in the American West, 1874-1939*. New York: Oxford University Press, 1990.
- Peterson del Mar, David. *What Trouble I Have Seen: A History of Violence against Wives*. Cambridge: Harvard University Press, 1996.
- Phillips, Roderick. *Putting Asunder: A History of Divorce in Western Society*. Cambridge: University of Cambridge Press, 1988.

- _____. *Untying the Knot: A Study History of Divorce*. New York: Cambridge University Press, 1991.
- Richmond, Robert W. *Kansas: A Land of Contrasts*, 3rd ed. Arlington Heights, IL: Forum Press, Inc., 1989.
- Riley, Glenda. *Building and Breaking Families in the American West*. Albuquerque: University of New Mexico Press, 1996.
- _____. *Divorce: An American Tradition*. New York: Oxford University Press, 1991.
- _____. *The Female Frontier*. Lawrence, Kansas: University of Kansas Press, 1988.
- Salmon, Marylynn. *Women and the Law of Property in Early America*. Chapel Hill: University of North Carolina Press, 1986.
- Scadron, Arlene, ed. *On Their Own: Widows and Widowhood in the American Southwest, 1848-1939*. Chicago: University of Illinois Press, 1988.
- Schlissel, Lillian ed. al. et. *Western Women: Their Land, Their Lives*. Albuquerque: University of New Mexico, 1988.
- Stowell, Daniel E. *In Tender Consideration: Women, Families, and the Law in Abraham Lincoln's Illinois*. Urbana: University of Illinois Press, 2002.
- Stratton, Joanna. *Pioneer Women: Voices from the Kansas Frontier*. New York: Simon and Schuster, 1981.
- VanBurkleo, Sandra F. *Belonging to the World: Women's Rights and American Constitutional Culture*. New York: Oxford University Press, 2001.
- Virdi, P.K. *The Grounds for Divorce in Hindu and English Law: A Study in Comparative Law*. Jawaharnagar, Delhi: Motilal Banarsidass Publishers, 1972.
- Weisberg, D. Kelly, ed. *Women and the Law: The Social Historical Perspective, Vol I: Women and the Criminal Law*. Cambridge, Mass.: Schenkman, 1982.
- _____. *Women and the Law: The Social Historical Perspective, Vol II: Property, Family and the Legal Profession*. Cambridge, Mass.: Schenkman, 1982.
- Weitzman, Lenore J. *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. New York: The Free Press, 1985.

Articles

- Basch, Norma. "The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution." *Signs*, v.12, no. 1 (Autumn 1986), 97-117.
- _____. "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America." *Feminist Studies*, v.5, n. 2 (Summer 1979), 346-366.
- _____. "Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815-1870." *Law and History Review*, v. 8, n. 1 (Spring 1990), 1-24.
- Cahn, Naomi. "Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law." *University of Illinois Law Review*. 2002 U. Ill. L. Rev. 651, 2002.
- Censer, Jane Turner. "'Smiling Through Her Tears': Ante-Bellum Southern Women and Divorce." *The American Journal of Legal History*, v. 25, n. 1 (January 1981), 24-47.
- Cott, Nancy. "Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts." *The William and Mary Quarterly*, v. 33, n. 4 (October 1976), 586-614.
- _____. "Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records." *Journal of Social History*, v. 10, n. 1 (Autumn 1976), 20-43.
- _____. "Marriage and Women's Citizenship in the United States, 1830-1934." *The American Historical Review*, v. 103, n. 5 (December 1998), 1440-1474.
- _____. "Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850." *Signs*, v. 4, no. 2 (Winter 1978), 219-236.
- Dewey, Frank L. "Thomas Jefferson's Notes on Divorce." *The William and Mary Quarterly*, v. 39, n. 1 (Jan 1982), 212-223.
- Estin, Ann Laquer. "Family Law Federalism: Divorce and the Constitution." *William and Mary Bill of Rights Journal*, 16 Wm & Mary Bill of Rts. J. 381, December 2007.
- Fenelon, William. "State Variations in United States Divorce Rates." *Journal of Marriage and the Family*, 33 (May 1971).
- Foster, Thomas A. "Deficient Husbands: Manhood, Sexual Incapacity, and Male Marital Sexuality in the Seventeenth-Century New England." *The William and Mary Quarterly*, v. 56, n. 4 (October 1999), 723-744.
- Friedman, Lawrence M. "A Dead Language: Divorce Law and Practice Before No-Fault." *Virginia Law Review*, v. 86, n. 7 (October 2000), 1497-1536.
- _____. "Rights of Passage: Divorce Law in Historical Perspective." *Oregon Law Review*. 63 Or. L. Rev. 649, 1984.

- Gonzales, Deena, "The Widowed Women of Santa Fe: Assessments on the Lives of an Unmarried Population, 1850-80," in *On Their Own: Widows and Widowhood in the American Southwest, 1848-1939*, Arlene Scadron, ed. Chicago: University of Illinois Press, 1988.
- Graulich, Melody. "Violence Against Women: Power Dynamics in Literature of the Western Family," in *The Women's West*, Susan Armitage and Elizabeth Jameson, eds. Norman: University of Oklahoma Press, 1987.
- Griswold, Robert. "Anglo Women and Domestic Ideology in the American West in the Nineteenth and Early Twentieth Centuries," in *Western Women: Their Land, Their Lives*, Lillian Schlissel et. al. eds. Albuquerque: University of New Mexico Press, 1988.
- _____. "Apart But Not Adrift: Wives, Divorce, and Independence in California, 1850-1890." *The Pacific Historical Review*, v. 49, n. 2 (May 1980), 265-283.
- _____. "Law, Sex, Cruelty, and Divorce in Victorian America, 1840-1900." *American Quarterly*, v. 38, n. 5 (Winter 1986), 721-745.
- _____. "Sexual Cruelty and the Case for Divorce in Victorian America." *Signs*, v. 11, n. 3 (Spring 1986), 529-541.
- _____. "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790-1900." *Journal of Social History*, v. 20, n. 1 (Autumn 1986), 127-148.
- Harris, Katherine. "Homesteading in Northeastern Colorado, 1873-1920: Sex Roles and Women's Experience," in *The Women's West*, Susan Armitage and Elizabeth Jameson, eds. Norman: University of Oklahoma Press, 1987.
- Hoegaerts, Josephine. "Legal or Just? Law, Ethics, and the Double Standard in the Nineteenth-Century Divorce Court." *University of Illinois Law and History Review*. 26 Law & Hist. Rev. 259, Summer 2008.
- Horowitz, Elizabeth. "The 'Holey' Bonds of Matrimony: A Constitutional Challenge to Burdensome Divorce Laws." *University of Pennsylvania Journal of Constitutional Law*. 8 U. Pa. J. Const. L. 877, August 2006.
- Lord, Hazel D. "Husband and Wife: English Marriage Law From 1750: A Bibliographic Essay." *Southern California Review of Law and Women's Studies*. 11 S. Cal. Rev. L. & Women's Stud. 1, Fall 2001.
- McDermott, Stacey Pratt. "Dissolving the Bonds of Matrimony: Women and Divorce in Sangamon County, Illinois, 1837-60," in Daniel W. Stowell, ed., *In Tender Consideration: Women, Families, and the Law in Abraham Lincoln's Illinois*. Chicago: University of Illinois Press, 2002.

- Moore, Melissa Genett. "The Story of a Kansas Pioneer," in *Writings of Farm Women 1840-1940: An Anthology*, Carol Fairbanks and Bergine Haakenson, eds. New York: Garland Publishing, Inc., 1990.
- Orpen, Adele. "Her Father's Right-Hand Man," in *Writings of Farm Women 1840-1940: An Anthology*, Carol Fairbanks and Bergine Haakenson, eds. New York: Garland Publishing, Inc., 1990.
- Petrik, Paula. "If She Be Content: The Development of Montana Divorce Law, 1865-1907." *Western Historical Quarterly*, v. 23, n. 3 (July 1987), 261-291.
- Price, Kathryn. "Mary Elizabeth Lease: Lawyer, Politician and Hellraiser." Women's Legal History Biography Project. Stanford Law School, Fall 1997.
www.womenslegalhistory.stanford.edu.
- Riley, Glenda. "Legislative Divorce in Virginia, 1803-1850." *Journal of the Early Republic*, v. 11, n. 1 (Spring 1991), 51-67.
- Welter, Barbara. "The Cult of True Womanhood: 1820-1860." *American Quarterly*, vol. 18, n. 2 (Summer 1966), 151-174.

Dissertations

- Bennett, Lyn Ellen. "Living on the Edge: Families in Crisis in Nineteenth Century Kansas." Ph.D. diss., University of Kansas, 1996.
- Watson, Anita Ernst. "Fading Shame: Divorce Stigma in American Culture, 1882-1939." Ph.D. diss., University of Nevada, Reno, 1997.